

No. 95-5015-CFH  
Status: GRANTED  
CAPITAL CASE

Title: Larry Grant Lonchar, Petitioner  
v.  
Albert G. Thomas, Warden

Docketed:  
June 29, 1995

Court: United States Court of Appeals for  
the Eleventh Circuit

Counsel for petitioner: Smith, Clive Stafford, Verrilli  
Jr., Donald B.

Counsel for respondent: Westmoreland, Mary Beth

Entry	Date	Note	Proceedings and Orders
1	Jun 29 1995	G	Application (A95-2) for a stay of execution of sentence of death, submitted to Justice Kennedy.
2	Jun 29 1995	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
6	Jun 29 1995		Application (A95-2) referred to the Court by Justice Kennedy.
10	Jun 29 1995		(A95-2) Application for stay of execution of sentence of death presented to Justice Kennedy and by him referred to the Court GRANTED. Motion of petitioner for leave to proceed in forma pauperis and petition for a writ of certiorari GRANTED. The Chief Justice and Justice Scalia would deny the application for stay and petition for a writ of certiorari.
11	Jun 29 1995		Application for stay of execution of sentence of death presented to Justice Kennedy and by him referred to the Court GRANTED. Motion of petitioner for leave to proceed in forma pauperis and petition for a writ of certiorari GRANTED. The Chief Justice and Justice Scalia would deny the application for stay and petition for a writ of certiorari.
12	Jul 11 1995		Order granted extending the time to file brief for petitioner on the merits until August 29, 1995.
14	Aug 9 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Eleventh Circuit.
13	Aug 14 1995		Record filed.
		*	Original record proceedings United States District Court for the Northern District of Georgia (BOX).
15	Aug 29 1995		Brief of petitioner Larry Grant Lonchar filed.
16	Aug 29 1995		Joint appendix filed.
17	Sep 28 1995		CIRCULATED.
18	Oct 3 1995		SET FOR ARGUMENT MONDAY, DECEMBER 4, 1995. (1ST CASE).
19	Oct 3 1995	X	Brief of respondent A.G. Thomas filed.
20	Nov 6 1995	X	Reply brief of petitioner filed.
21	Nov 30 1995		LODGING by petitioner. Eleven copies of Petition for Writ of Habeas Corpus filed in the United States District Court for the Northern District of Georgia on June 27, 1995.
22	Dec 4 1995		ARGUED.

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Supreme Court, U.S.  
FILED  
JUN 29 1995  
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LARRY GRANT LONCHAR,

Petitioner,

v.

A.G. THOMAS, Warden, Georgia  
Diagnostic & Classification Center,

Respondent.

No. 94-~~94~~ 95-5015

ORIGINAL

PETITION FOR A WRIT OF CERTIORARI  
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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EDITOR'S NOTE

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PETITION FOR A WRIT OF CERTIORARI  
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

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I. WHETHER THE ELEVENTH CIRCUIT WAS CORRECT IN CREAT-  
ING, WITHOUT JUDICIAL PRECEDENT AND WITHOUT NOTICE  
TO THE PETITIONER, A NOVEL RULE TO BAR THE FIRST  
PETITION FOR HABEAS CORPUS RELIEF EVER FILED BY  
PETITIONER BASED ON AMORPHOUS EQUITABLE NOTIONS  
THAT EXTEND WELL BEYOND RULE 9(A) AND 9(B) OF THE  
RULES GOVERNING 62254 CASES. WHEN EVERYONE HAD  
PREVIOUSLY ASSURED PETITIONER THAT THERE WOULD BE  
NO BAR TO HIS FEDERAL PETITION?

II. WHETHER, WITHOUT PROPER NOTICE OF THE NOVEL RULE  
AND AN ADEQUATE OPPORTUNITY TO DEVELOP EVIDENCE, A  
MENTALLY-ILL PETITIONER'S VARYING MOTIVATIONS BE-  
HIND FILING A GOOD FAITH PETITION FOR HABEAS CORPUS  
RELIEF FOR THE FIRST TIME IN FEDERAL COURT WERE  
PROPERLY CONSIDERED AS VIRTUALLY DISPOSITIVE OF THE  
COURT'S DUTY TO CONSCIENTIOUSLY CONSIDER THE ISSUES  
PRESENTED?

PETITION FOR A WRIT OF CERTIORARI  
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

The Petitioner, LARRY GRANT LONCHAR, prays for a writ of  
certiorari to review the judgment of the Eleventh Circuit Court  
of Appeals dismissing his first federal habeas corpus petition on  
novel equitable grounds without any determination on the merits  
of any issue.

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OPINION BELOW

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The opinion of the Eleventh Circuit Court of Appeals is  
reported at Lonchar v. Thomas, \_\_\_ F.3d \_\_\_ (11th Cir. 1995) (not  
yet reported; attached as Exhibit A).

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JURISDICTION

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The judgment of the Eleventh Circuit Court of Appeals was  
entered on June 29, 1995. The jurisdiction of the Supreme Court  
is therefore timely invoked under 28 U.S.C. § 1257 on the ground  
that a right or privilege of the defendant is claimed under the  
Constitution of the United States which right has been denied by  
Respondent, Warden Thomas.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

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The Fifth Amendment to the United States Constitution pro-  
vides, in pertinent part, that --

No person shall . . . be deprived of life .  
 . . without due process of law . . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part, that --

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The Eighth Amendment to the United States Constitution provides, in pertinent part, that --

Excess bail shall not be required . . . nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that --

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person to life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 9, paragraph 2 of the United States Constitution provides that--

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

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#### STATEMENT OF THE CASE

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Petitioner was convicted and sentenced to death in DeKalb County, Georgia. His conviction and sentence were affirmed by the Georgia Supreme Court. Lonchar v. State, 258 Ga. 447, 369 S.E.2d 749 (1988). Mr. Lonchar subsequently allowed counsel to

file a petition for a writ of certiorari to this Court, which was denied. Lonchar v. Georgia, 489 U.S. 1019, 109 S. Ct. 818, 103 L. Ed. 2d 808 (1989). A petition for rehearing was also filed and denied. Lonchar v. Georgia, 489 U.S. 1061, 109 S. Ct. 1332, 103 L. Ed. 2d 600 (1989).

Larry Lonchar filed a petition for a writ of Habeas Corpus in Butts County, Georgia, on June 23, 1995. This was dismissed, and a certificate of probable cause denied by the Georgia Supreme Court. He immediately filed his first (and, to date, only) Federal Petition for a Writ of Habeas Corpus in the Northern District of Georgia. The Court held a hearing, denied Respondent Thomas' motion to dismiss, and entered a stay of execution.

Respondent moved to vacate the stay. This was granted this afternoon, effective at 5 p.m. The opinion of the Eleventh Circuit Court of Appeals is to be found at Lonchar v. Thomas, \_\_\_ F.3d \_\_\_ (11th Cir. 1995) (not yet reported; attached as Exhibit A). Mr. Lonchar is currently scheduled to be executed at 7 p.m.

It is worth remembering that this is THE FIRST TIME EVER that a court has totally barred a man who is facing execution FROM EVER LITIGATING ONE FEDERAL HABEAS CORPUS PETITION. It is also worth remembering that this case involves a man who has serious mental problems, and who has been found to suffer from profound depression. These are critical factors ignored in the



rush to execute him because radical assumptions made in the Eleventh Circuit opinion.<sup>1</sup>

#### REASONS FOR GRANTING THE WRIT

Due to the mental instability of many Death Row inmates, and the frequently intolerable conditions of their confinement, some wonder whether to continue living or let the State carry through out the threat of execution--a dilemma as old as Time.<sup>2</sup> While

1. In proceedings that are related to this case, which demonstrate clearly the mental problems that Larry Lonchar suffers, a state habeas court dismissed a next-friend petition (filed obviously without Larry Lonchar's consent) for lack of standing, and the Supreme Court of Georgia affirmed. See Kellogg v. Zant, 260 Ga. 182, 390 S.E.2d 839, cert. denied, 111 S. Ct. 231, 112 L. Ed. 2d 191, reh. denied, 111 S. Ct. 573, 112 L. Ed. 2d 579 (1990). The same next-friend sought relief from the Federal District Court, which also dismissed the petition. Kellogg v. Zant, 1:90-CV-2336-JTC (N.D.Ga. 1992), aff'd, Lonchar v. Zant, 978 F.2d 637 (11th Cir. 1992). A second next-friend petition was likewise dismissed through the state and federal system last week.

2. Everyone is familiar with the agonies of Hamlet, in his famous soliloquy. Indeed, one inmate might have been quoting it when he asked the court to "please be merciful and give me an endless sleep as soon as you can so this pain and suffering that I have will be no more." People v. Stanworth, 71 Cal. 2d 820, 457 P.2d 889, 80 Cal. Rptr. 49 (1969). Perhaps reflecting on Hamlet's doubts as to the consequences of endless sleep, Stanworth later claimed that his attorney was ineffective for accepting a client's transient self-destructive efforts to seek his own death. People v. Stanworth, 11 Cal. 3d 588, 608, 522 P.2d 1058, 1072, 114 Cal. Rptr. 250, 264 (1974). Stanworth never was executed. In Whitmore v. Arkansas, 495 U.S. 149, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990), this Court recognized the recurrence of the issue. Id., 495 U.S. at 154. Indeed, more than one third of all the prisoners on Death Row in Florida have attempted suicide, judicially or otherwise, while awaiting execution. See Strafer, Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention, 74 J. Crim. L. & Criminology, 860, 872 n. 44 (1983).

there may often have been sincere vacillation on the part of condemned men and women, no inmate has ever been denied a first writ of habeas corpus on the basis of the unsolicited efforts of "next friends", filed against the inmate's wishes, in earlier pleadings. On the basis of a novel theory not even advanced by the State in the District Court, which is concededly premised on no legal authority, Larry Lonchar may become the first such person at SEVEN P.M. this evening.

- I. WHETHER THE ELEVENTH CIRCUIT WAS CORRECT IN CREATING, WITHOUT JUDICIAL PRECEDENT AND WITHOUT NOTICE TO THE PETITIONER, A NOVEL RULE TO BAR THE FIRST PETITION FOR HABEAS CORPUS RELIEF EVER FILED BY PETITIONER BASED ON AMORPHOUS EQUITABLE NOTIONS THAT EXTEND WELL BEYOND RULE 9(A) AND 9(B) OF THE RULES GOVERNING §2254 CASES, WHEN EVERYONE HAD PREVIOUSLY ASSURED PETITIONER THAT THERE WOULD BE NO BAR TO HIS FEDERAL PETITION?

The Eleventh Circuit vacated the stay on the basis of "abuse of the writ," unconcerned whether "we view this case as one in which Lonchar has abused the writ . . . or simply involv[ed] abusive conduct and misuse of the writ." Exhibit A, at 7. The only basis even suggested for this extraordinary holding was Gomez v. United States District Court, 112 S. Ct. 1652 (1992), where this Court considered a § 1983 action brought by an inmate who had previously filed and litigated "four previous federal habeas petitions." Id. at 1653. The only claim for relief on this fifth application was the unconstitutionality of the use of lethal gas.<sup>3</sup> In this case, in his FIRST APPLICATION<sup>4</sup>, there

3. Even in spite of the tenuous merits of Harris' one claim for relief, two Justices dissented from the denial of a stay. Id. at 1653.

are several claims that would almost certainly provide grounds for habeas corpus relief. For example, Mr. Lonchar was not even present for large portions of his trial and the prevailing authority is that this must always result in reversal in a capital case.<sup>5</sup>

Larry Lonchar stands to become the first person executed in the United States since 1972 who has asked for, but never been allowed a Federal Habeas Corpus Petition. This case does not, however, involve just Larry Lonchar; it involves a conflict between the Eleventh Circuit panel and every other reported decision on the issue in the past twenty years. There is no case that justifies this action. In arguing his side, the Warden concedes "the unavailability of a case directly on point." See Warden's XI Motion, at 9.

There is, however, plenty of precedent in conflict with the Warden's argument, suggesting that this expansion of Rule 9 would be inappropriate. In conflict with the Eleventh Circuit is the recent decision in Collins v. Byrd, 114 S. Ct. 1288 (1994). Byrd

4. (...continued)

4. In arguing for the dismissal of fundamental constitutional claims, "the State's position would be particularly difficult where--as in the present case--a determination has not yet secured a determination on the merits of [any of] his claims." Potts v. Kemp, 764 F.2d 1369, 1371 (11th Cir. 1985).

5. Clear precedent from the Eleventh Circuit indicates that Mr. Lonchar will receive a new trial since he was not present for much of his first trial. This is a capital case and under the authority of "Diaz and Hopt . . . a capital defendant's right to presence is nonwaivable." Proffitt v. Wainwright, 685 F.2d 1227, 1258 (1982), modified on rehearing, 706 F.2d 311 (11th Cir. 1983); accord Hall v. Wainwright, 733 F.2d 766, 775 (11th Cir. 1984).

had not filed his federal petition for eleven years after the crime (compared to the nine years in this case). The state sought to argue that this would provide the basis for Rule 9(a)'s prohibition against "inexcusable delay," an issue not even argued by Warden Thomas in this case. The Sixth Circuit stayed the case, and the State sought review from this Court.

Eight justices deemed the issue so clear that they did not find any need at all to comment on the summary denial of the State's motion. Importantly, Justice Scalia concurred with their Rule 9(a) analysis, noting that the Supreme Court has not adopted the radical analysis espoused by the Eleventh Circuit today:

We have for many purposes . . . abandoned (or forgotten) the equitable nature of habeas corpus, and under the current state of our law I cannot say that it would have been unlawful or an abuse of discretion for the Sixth Circuit to require District Court consideration of the habeas corpus petition on its merits, and to say the execution pending that consideration.

Id. at 1288 (opinion of Scalia, J.).<sup>6</sup> The ruling of the Eleventh Circuit to the contrary is not supported by the law.

Further, in conflict with the Eleventh Circuit's analysis is every other circuit in the nation. There is no other court that has judicially expanded the ambit of Rule 9 to create this novel and constitutionally troubling rule. Such a rule was specifically rejected by Congress when 28 U.S.C. § 2254 was enacted. See, e.g.,

6. Justice Scalia's only dissent from the Sixth Circuit's order concerned the timetable and other impositions leveled at the District Court, which he considered "a plain abuse of discretion, if not entirely ultra vires." Id. at 1289.



Aiken v. Spalding, 684 F.2d 632, 633 (9th Cir. 1982) ("Congress indicated its disfavor for dismissals for delay under Rule 9(a) by eliminating from the proposed draft of the rule a rebuttable presumption of prejudice that could be invoked by the state after a delay of five years.").

Indeed, in canvassing every habeas case ever decided, Professor Liebman has found no support for the Eleventh Circuit's new doctrine, and has argued that any such "rule, it has been suggested, would risk violating the constitutional provision forbidding suspension of the writ except in times of war or rebellion." Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, Vol. 2, at 702-03 (2d Ed. 1994) (citing authorities); see also id. at 181 n.66 (quoting Alexander Hamilton); Aiken v. Spalding, 684 F.2d 632, 633 (9th Cir. 1982) ("[l]iberal construction [of Rule 9(a)] also avoids a confrontation with the Suspension Clause of Art. I, § 9, of the United States Constitution").

Even assuming that such a rule of "equity" should properly be adopted, without notice to the petitioner (*see infra*), there are other profound questions that the Eleventh Circuit does not consider. First, for example, can we really attribute the "delay" in this case to Larry Lonchar? He was not the one pursuing the unauthorized "next friend" petition, but was trying to secure his own execution, often referring to Ms. Westmoreland (counsel for Warden Thomas) as "his" attorney. No case has held this against the inmate who wanted to die. In Potts the Eleventh Circuit suggested that there was a problem with "reliance on evidence

presented in a [next-friend] suit to which Potts was not a party. We conclude the court erred in relying on evidence presented in the 'next friend' hearing and that such error requires a remand." Potts v. Zant, 638 F.2d 727, 750 (5th Cir. Unit B, 1981). Reason might well suggest that the court should not rely on the time that elapses as a result of the next friend's unauthorized litigation, either. Certainly, one might think that the efforts made by the Petitioner to shorten this litigation should be taken into account in assessing whether he (or someone else) has been "abusive"--yet the Eleventh Circuit does not pause to consider this.

Second, deliberate justice might question whether the focus should be on the total time elapsed since the moment of sentence, when there is no time bar in state court, and there has never previously been a true opportunity to come to federal court. Indeed, if the focus must be on federal litigation, the federal petition in question here was filed within 24 hours of the exhaustion of such remedies as the State of Georgia saw fit to provide.<sup>7</sup> There is no case that holds that the prior unauthorized petitions bar Mr. Lonchar now.

This list is far from exhaustive, but it does illustrate the need for this Court to intervene and prevent the hurried execution

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7. If Mr. Lonchar had "adopted" the federal next-friend petition that someone else filed, he would not have been able to secure federal relief at that time. Rather, he would have been sent back to state court to exhaust his claims, since he had never completed his first state court post-conviction proceeding. He has only now done so, and he cannot be legally faulted for not bringing his federal petition before Monday--immediately upon exhaustion of his state court remedies.

of the first person who has been wholly denied federal habeas corpus review in twenty years.

Certainly, where the questions involved would seem to be so weighty, there is no authority to fashion a novel rule on a couple of hours' notice and with only forty minutes available for developing this petition.<sup>8</sup> Again, while few reasonable jurists would admit the existence of Warden Thomas' novel "rule of law," it should not be promulgated to take a life by judicial fiat in contravention of all precedent and without deliberate review.

II. WHETHER, WITHOUT PROPER NOTICE OF THE NOVEL RULE AND AN ADEQUATE OPPORTUNITY TO DEVELOP EVIDENCE, A MENTALLY-ILL PETITIONER'S VARYING MOTIVATIONS BEHIND FILING A GOOD FAITH PETITION FOR HABEAS CORPUS RELIEF FOR THE FIRST TIME IN FEDERAL COURT WERE PROPERLY CONSIDERED AS VIRTUALLY DISPOSITIVE OF THE COURT'S DUTY TO CONSCIENTIOUSLY CONSIDER THE ISSUES PRESENTED?

Even were we to agree that the Eleventh Circuit was correct to judicially legislate a change to the clear rules governing habeas corpus relief, there are many other complex issues that might be debated at length when assessing the policy considerations of the lower court's ruling. One is, of course, whether equity would support a rule resulting in dismissal when the record indicates clearly that Larry Lonchar has been told by State Court Judge

8. For this reason, since all the issues are so interrelated, Petitioner incorporates his prior arguments in all prior pleadings in the courts below (lodged with this Court as they have been filed) to properly frame the issues presented in this Court.

Connelly, by Federal District Judge Camp,<sup>9</sup> by his own counsel and -periodically- by counsel for the Warden<sup>10</sup> that relief would be available should he elect to proceed with his appeals. It would be fundamentally inequitable to create a novel rule now in the heat of the moment that would result in the execution of Larry Lonchar within hours.

This rule suddenly sprang up today. Yesterday, the Warden certainly seemed to be arguing along the lines of Rule 9(b). Today, this argument changed, and turned to this hitherto unheard-of "rule" extraneous to anything previously seen in habeas corpus litigation. To analogize to the equity required of state courts, before it can be applied to bar relief a "procedural rule must be 'clearly announced to defendant and counsel.'" Wheat v. Thigpen, 793 F.2d 621, 625 (5th Cir. 1986) (quoting Henry v. Mississippi,

9. During the next-friend hearing (held without Petitioner's authorization) Judge Camp advised Mr. Lonchar that "you can change you mind up until the time, of course, sentence is executed, and bring a petition for habeas corpus." (11/14/91 Hrg. at 443). How does equity compel the Eleventh Circuit to turn this promise into a lie?

10. Counsel for the Warden seemed to shift another position yesterday announcing that no such assurance had been made with respect to federal court. However, in state court counsel announced that there had been no "specific waiver on the record in any particular proceeding." (6/23/95 Hrg. at 21) (emphasis supplied) To the extent that counsel now argues that there was such a waiver in federal court, counsel apparently refers to the prior federal proceedings where Judge Camp discussed the possibility of Mr. Lonchar's "waiv[ing] any appeals on [his] behalf in federal court or otherwise." (11/14/91 Hrg. at 437) (emphasis supplied) It would seem that this would, were it really a waiver, operate in both state and federal court. However, it would seem still clearer that there was no such waiver since Judge Camp went on to advise Mr. Lonchar that "you can change you mind up until the time, of course, sentence is executed, and bring a petition for habeas corpus." Id. at 443.



379 U.S. 443, 448 n.3, 85 S. Ct. 564, 567 n.3, 13 L. Ed. 2d 408 (1965)). Petitioner had no forewarning that this novel rule might be sprung on him, and therefore no meaningful opportunity to address the argument with evidence.

One very troubling issue is the "rule" enacted today that purports to look to Mr. Lonchar's "motivations" in filing this petition. While his motivation not to file before now might well be relevant to Rule 9(a) or even on a successive petition a Rule 9(b) question, there is absolutely no basis to look behind his good faith litigation of constitutional claims now and ask why he filed his petition.

Nonetheless, Warden Thomas has argued--with undeniable imagination--that one focus of this novel rule of equity should be why Larry Lonchar plans to litigate his federal constitutional rights. Without debate, or citation to authority, the Eleventh Circuit adopted this argument, opining without any support in the petition that "Lonchar does not explain why this court should entertain a habeas petition that is explicitly brought to delay his execution, not to vindicate his constitutional rights." See Exhibit A, at 7.

This is simply not the case. The unrebutted testimony in the lower court was that Larry Lonchar did wish to vindicate his constitutional rights. What does the Eleventh Circuit suggest? That when Larry Lonchar said that he meant to challenge his conviction and sentence, he actually meant that he did not? That a waiver may be found beyond a reasonable doubt when the petitioner

expressly says that he does not mean to waive his rights? This is a novel rule of law indeed. Cf. Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410 (1986) (State must bear burden of showing waiver "made with a full awareness both of the right being abandoned and the consequences of the decision to abandon it").

Larry Lonchar had previously seen no worthwhile reason to avoid death. Now he has finally seen that his litigation could achieve broader purposes than to save his own life. This does not, of course, mean that he is insincere about winning his case. Indeed, he explicitly agreed to litigate all issues presented:

Q. Let me ask you this, Mr. Lonchar. You, your attorneys, have filed a petition in court that contains 59 pages, and you signed the verification that you have personal knowledge of the allegations in the Petition for Writ of Habeas Corpus, and that they are true and correct, and that you seek the relief requested in there. Did you sign that verification, I assume?

A. Yes, Your Honor.

\* \* \*

Q. Now, I understand your point with regard to the question of the manner of execution so that you can donate your organs, that's the point you were making to me a moment ago; is that correct?

A. That's correct.

Q. Now, a great deal of the petition goes far beyond that, and alleging irregularities and violations of your rights that would affect both your sentence and conviction and your sentence of execution in a prior state court proceeding. It is your wish to pursue those claims through a petition for Federal Habeas Corpus Relief? Do you understand my question.

A. Yes, Your Honor. Personally, I have to agree that I have to pursue this position to follow on what I would like to do, so I would have to say to the Court that, yes, I do.

(F.H.T. at 18-19)

Judge Camp felt that Mr. Lonchar's major motivation behind his litigation was to use his case as a vehicle for systemic change, to abolish the Electric Chair and provide inmates on Death Row with an option to save other lives, if in fact their executions could not be averted. Judge Camp explicitly did not find, however, that this vitiated the good faith with which the rest of the petition was to be litigated. Such a finding would have been entirely insupportable.

While the Warden does advert to this in passing as an element of his novel rule, this Court should think long and hard before ruling that Larry Lonchar's motives in litigating all the issues in his case are relevant to what the outcome will actually be. On the face of the petition, it would probably be true to say that he has much more chance of winning the challenge to his conviction than to change the method of execution.<sup>11</sup>

It is true, but entirely irrelevant to the merits of the claims, that Larry Lonchar filed his 1993 state habeas petition to avoid his brother's suicide. (F.H.T. at 19) Now, one precipitant

11. As mentioned above, clear precedent indicates that Mr. Lonchar will also, or alternatively, receive a new trial since he was not present for much of his first trial. This is a capital case and under the authority of "Diaz and Hopt . . . a capital defendant's right to presence is nonwaivable." Proffitt v. Wainwright, 685 F.2d 1227, 1258 (1982), modified on rehearing, 706 F.2d 311 (11th Cir. 1983); accord Hall v. Wainwright, 733 F.2d 766, 775 (11th Cir. 1984).

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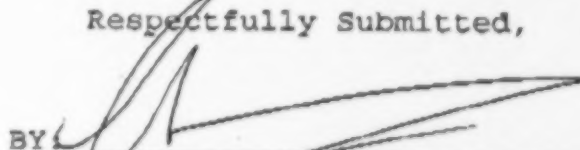


without ever being allowed the chance to vindicate his rights. This Court cannot let that happen without considering the merits of his petition in a humane and deliberate manner.

CONCLUSION

WHEREFORE, Petitioner respectfully moves that this Court grant certiorari to consider the important questions presented above.

Respectfully Submitted,

BY:   
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COUNSEL FOR PETITIONER

Certificate of Service

I hereby certify that I have this day served a copy of the foregoing pleading by mail upon Mary Beth Westmoreland, Assistant Attorney General, 132 Judicial Building, Atlanta, Ga. 30334.

This 29th day of June, 1995.



STATE BOARD OF PARDONS AND PAROLES



DENIAL OF APPLICATION FOR STAY OF EXECUTION

WHEREAS: Upon the 27th day of June, 1987, three sentences of death were imposed on the Defendant in the case of *The State of Georgia vs. Larry Grant Lonchar*, Case No. 86-CR-3747 before the Superior Court of DeKalb County; and,


WHEREAS: An order of the Superior Court of DeKalb County dated the 7th day of June, 1995, directs that Larry Grant Lonchar shall be executed by the Department of Corrections during a certain period of time ending at noon on the 30th day of June, 1995; and,

WHEREAS: The State Board of Pardons and Paroles having received from attorney John Matteson on behalf of his client Larry Grant Lonchar an application for clemency requesting the Board exercise its authority to enter an order staying the execution of Larry Grant Lonchar; and,

WHEREAS: The State Board of Pardons and Paroles having reviewed and deliberated on the application and the records of the Board regarding Larry Grant Lonchar;

THEREFORE: Pursuant to the provisions of Article IV, Section II, Paragraph II (d) of the Constitution of the State of Georgia, by the Members of the State Board of Pardons and Paroles, IT IS ORDERED HEREBY that the clemency application on behalf of Larry Grant Lonchar requesting his execution be stayed is DENIED.

For the State Board of Pardons and Paroles upon this 29th day of June, 1995;

  
Wayne Garner  
Chairman

SEAL

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

No. 95-8821

FILED  
U.S. COURT OF APPEALS  
ELEVENTH CIRCUIT

JUN 29 1995

MIGUEL J. CORTEZ  
CLERK

LARRY GRANT LONCHAR,

Petitioner-Appellee,

versus

ALBERT G. THOMAS, Warden,  
Georgia Diagnostic and  
Classification Center,

Respondent-Appellant.

Appeal from the United States District Court  
for the Northern District of Georgia

Before TJOFLET, Chief Judge, COX and DUBINA, Circuit Judges.

BY THE COURT:

Larry Grant Lonchar's request for a temporary stay of  
execution pending consideration of his emergency petition for  
rehearing with suggestion of rehearing en banc is DENIED.

The petition for panel rehearing is DENIED. The mandate shall  
issue immediately.

United States Court of Appeals  
Eleventh Circuit  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

June 29, 1995

In Reply, Give Number  
Of Case And Name Of Parties

Miguel J. Cortez  
Clerk

Luther D. Thomas, Clerk  
United States District Court  
Northern District of Georgia  
2211 United States Courthouse  
75 Spring Street, S.W.  
Atlanta, Georgia 30303-3361

No. 95-8821

Larry Grant Lonchar -v- Albert G. Thomas, etc.  
D.C. No. 1:95-CV-1656-JTC

- XX) The enclosed certified copy of the judgment and a copy of this  
court's opinion are hereby issued as the mandate of this court.
- ( ) The enclosed certified copy of the Rule 36-1 decision and judgment  
are hereby issued as the mandate of this court.
- ( ) The motion for stay of mandate has been denied. The enclosed  
certified copy of the judgment and a copy of this court's opinion  
are hereby issued as the mandate of this court.
- ( ) The Supreme Court has denied certiorari. The enclosed certified  
copy of the judgment and a copy of this court's opinion are hereby  
issued as the mandate of this court.
- ( ) The Supreme Court has denied certiorari. This court's mandate  
having previously issued, no further action will be taken by this  
court.
- ( ) Enclosed is the Bill of Costs supplementing this court's mandate  
which has previously issued.

Also enclosed are the following:

- ( ) Bill of Costs  
( ) Original exhibits, consisting of:  
( ) Original record on appeal or review, consisting of:

Please acknowledge receipt on the enclosed copy of this letter.

Sincerely,

MIGUEL J. CORTEZ, Clerk

By: Joyce T. Pope  
Deputy Clerk  
(404) 331-2904

Encl.

c: Mary Beth Westmoreland  
John Matteson  
Clive Stafford Smith

MDT-1  
2/92

**United States Court of Appeals**  
**FOR THE ELEVENTH CIRCUIT**

No. 95-8821

District Court Docket No. 1:95-CV-1656

LARRY GRANT LONCHAR,

Petitioner-Appellant,

versus

ALBERT G. THOMAS, Warden,  
Georgia Diagnostic and  
Classification Center,

Respondent-Appellee.

-----  
Appeal from the United States District Court  
for the Northern District of Georgia  
-----

Before TJOFAT, Chief Judge, COX and DUBINA, Circuit Judges.

J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the motion and response on file;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby VACATED.

Entered: June 29, 1995  
For the Court: Miguel J. Cortez, Clerk

By:   
Deputy Clerk

ISSUED AS MANDATE: JUNE 29, 1995

EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES

LARRY GRANT LONCHAR,

Petitioner,

v.

A.G. THOMAS, Warden, Georgia  
Diagnostic & Classifica-  
tion Center,

Respondent.

No. 94-  
EXECUTION CURRENTLY  
SET FOR 7 P.M.  
JUNE 29, 1995

Supreme Court, U.S.  
FILED  
JUN 29 1995

CLERK OF THE COURT

ORIGINAL

MOTION FOR A STAY OF EXECUTION

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IN THE SUPREME COURT OF THE UNITED STATES

LARRY GRANT LONCHAR,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 94-
	)	EXECUTION CURRENTLY
	)	SET FOR 7 P.M.
A.G. THOMAS, Warden, Georgia	)	JUNE 29, 1995
Diagnostic & Classifica-	)	
tion Center,	)	
	)	
Respondent.	)	

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JUNE 29, 1995

MOTION FOR A STAY OF EXECUTION

TO THE HON. ANTHONY KENNEDY, JUSTICE, GREETINGS:

COMES NOW, PETITIONER, and respectfully moves that this Court stay the death warrant entered by the Georgia trial court. In support of this motion, Petitioner states as follows:

I. STATEMENT OF THE CASE

Petitioner was convicted and sentenced to death in DeKalb County, Georgia. His conviction and sentence were affirmed by the Georgia Supreme Court. Lonchar v. State, 258 Ga. 447, 369 S.E.2d 749 (1988). Mr. Lonchar subsequently allowed counsel to file a petition for a writ of certiorari to this Court, which was denied. Lonchar v. Georgia, 489 U.S. 1019, 109 S. Ct. 818, 103 L. Ed. 2d 808 (1989). A petition for rehearing was also filed and denied.

Lonchar v. Georgia, 489 U.S. 1061, 109 S. Ct. 1332, 103 L. Ed. 2d 600 (1989).<sup>1</sup>

Larry Lonchar filed a petition for a writ of Habeas Corpus in Butts County, Georgia, on June 23, 1995. This was dismissed, and a certificate of probable cause denied by the Georgia Supreme Court. He immediately filed his first (and, to date, only) Federal Petition for a Writ of Habeas Corpus in the Northern District of Georgia. The Court held a hearing, denied Respondent Thomas' motion to dismiss, and entered a stay of execution.

Respondent moved to vacate the stay. This was granted this afternoon, effective at 5 p.m. The opinion of the Eleventh Circuit Court of Appeals is to be found at Lonchar v. Thomas, \_\_\_ F.3d \_\_\_ (11th Cir. 1995) (not yet reported; attached as Exhibit A). Mr. Lonchar is currently scheduled to be executed at 7 p.m.

It is worth remembering that this is a man who has serious mental problems, and who has been found to suffer from profound depression. This should be borne in mind in the rush to execute him because radical assumptions made in the Eleventh Circuit opinion.

1. In proceedings that are related to this case, a state habeas court dismissed a next-friend petition for lack of standing, and the Supreme Court of Georgia affirmed. See Kellogg v. Zant, 260 Ga. 182, 390 S.E.2d 839, cert. denied, 111 S. Ct. 231, 112 L. Ed. 2d 191, reh. denied, 111 S. Ct. 573, 112 L. Ed. 2d 579 (1990). The same next-friend sought relief from the Federal District Court, which also dismissed the petition. Kellogg v. Zant, 1:90-CV-2336-JTC (N.D.Ga. 1992), aff'd, Lonchar v. Zant, 978 F.2d 637 (11th Cir. 1992). A second next-friend petition was likewise dismissed through the state and federal system last week.



## II. THE ELEVENTH CIRCUIT'S OPINION

The Eleventh Circuit vacated the stay on the basis of "abuse of the writ," and was not concerned whether "we view this case as one in which Lonchar has abused the writ . . . or simply involv[ed] abusive conduct and misuse of the writ." Exhibit A, at 7. Regardless of this lack of concern, one thing is clear--the Court cites no rule (neither Rule 9(a) nor Rule 9(b) has even been invoked by the State) and no case that supports the proposition that there can be abuse of the writ on a first petition under the circumstances of this case.

If ever there were a case where reasonable jurists could differ, this is it. Judge Camp is certainly not known for being a liberal judge, although he is a fair one. He is also a reasonable jurist. Reasonably enough, he found no legal authority to support the denial of a stay. Since that is far beyond the showing that is required to enter a stay, a stay was properly entered by Judge Camp. The Eleventh Circuit should not have disturbed it.

## III. JUDGE CAMP'S STAY ORDER WAS ENTIRELY APPROPRIATE

The only question before this Court is whether a stay is appropriate. Because of the obviously drastic results of the denial of a stay, and the relatively insignificant prejudice to the State when a stay is granted, the burden rested on the Warden to show the Eleventh Circuit Court of Appeals "that the issues [presented in the petition] are [not] debatable among jurists of reason," or that the issues presented "are [not] 'adequate to

deserve encouragement to proceed further.'" Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (citations omitted).

The Warden simply cited no case that comes close to suggesting that Mr. Lonchar should be denied a stay. The "novel" rule of habeas corpus litigation proposed by the Warden essentially asks this Court to spontaneously and judicially create a bar to habeas corpus relief that goes far beyond Rules 9(a) and 9(b) to the Rules Governing Habeas Corpus Actions. This bar would be one that has no precedent in the law, and that was never announced to Larry Lonchar as a litigant to give him fair notice of the hidden barrier reef that might sink his entirely legal ship.

The record indicates that Larry Lonchar has been told by State Court Judge Connelly, by Federal District Judge Camp, by counsel and--periodically--by counsel for the Warden<sup>2</sup> that relief would be available should he elect to proceed with his appeals. It would be fundamentally inequitable to create a novel rule now in the heat of

---

2. Counsel for the Warden seemed to shift another position yesterday announcing that no such assurance had been made with respect to federal court. However, in state court counsel announced that there had been no "specific waiver on the record in any particular proceeding." (6/23/95 Hrg. at 21) (emphasis supplied) To the extent that counsel now argues that there was such a waiver in federal court, counsel apparently refers to the prior federal proceedings where Judge Camp discussed the possibility of Mr. Lonchar's "waiv[ing] any appeals on [his] behalf in federal court or otherwise." (11/14/91 Hrg. at 437) (emphasis supplied) It would seem that this would, were it really a waiver, operate in both state and federal court. However, it would seem still clearer that there was no such waiver since Judge Camp went on to advise Mr. Lonchar that "you can change your mind up until the time, of course, sentence is executed, and bring a petition for habeas corpus." Id. at 443.

the moment that would result in the execution of Larry Lonchar within hours.

IV. A STAY MUST BE GRANTED WHERE VARIOUS ISSUES EXIST ON WHICH REASONABLE JURISTS COULD EITHER DIFFER, OR COULD ONLY RULE IN PETITIONER'S FAVOR

There are any number of reasons that compel a stay of execution in this case.

A. WITHOUT MORE ADO, THIS COURT SHOULD FIND THE ISSUE CONTROLLED BY COLLINS v. BYRD

If there were ever any question about it, disposition of this Stay application would be controlled by Collins v. Byrd, 114 S. Ct. 1288 (1994). Byrd had not filed his federal petition for eleven years after the crime (compared to the nine years in this case). The state sought to argue that this would provide the basis for Rule 9(a)'s prohibition against "inexcusable delay," an issue not even argued by Warden Thomas in this case. The Sixth Circuit stayed the case, and the State sought review from this Court.

Eight justices deemed the issue so clear that they did not find any need at all to comment on the summary denial of the State's motion. Justice Scalia concurred with their Rule 9(a) analysis:

We have for many purposes . . . abandoned (or forgotten) the equitable nature of habeas corpus, and under the current state of our law I cannot say that it would have been unlawful or an abuse of discretion for the Sixth Circuit to require District Court consideration of the habeas corpus petition on its merits, and to say the execution pending that consideration.

Id. at 1288 (opinion of Scalia, J.).<sup>3</sup> The ruling of the Eleventh Circuit to the contrary is not supported by the law.

In this case, the effort to execute Larry Lonchar with an excess of expedition threatens this Court with indigestion. Before even chewing on the first bite of Federal Habeas Corpus review, this Court has been asked to swallow Mr. Lonchar, his constitutional rights, Great Writ and all. As with apples, serious issues surrounding the life and death of a mentally ill inmate on death row call for deliberate digestion.

Petitioner is not seeking any unnecessary delay in this case. In fact, Petitioner is further along in his post-conviction remedies than any other similarly-situated inmate on Georgia's Death Row.<sup>4</sup> In arguing for the dismissal of fundamental constitutional claims, "the State's position would be particularly difficult where--as in the present case--a determination has not yet secured a determination on the merits of [any of] his claims." Potts v. Kemp, 764 F.2d 1369, 1371 (11th Cir. 1985). The State's position is particularly difficult here, as it was in Collins v. Byrd. The same result should apply, and the execution be stayed.

3. Justice Scalia's only dissent from the Sixth Circuit's order concerned the timetable and other impositions leveled at the District Court, which he considered "a plain abuse of discretion, if not entirely ultra vires." Id. at 1289.

4. As discussed below, 16 inmates on Georgia's Death Row whose death sentences were affirmed prior to Mr. Lonchar's are not yet in federal court, and every single one of the 36 inmates (one of whom has two death sentences from separate trials) who had their death sentences affirmed on direct appeal since that date has yet to reach federal court.



B. THE ELEVENTH CIRCUIT WOULD BE CLEARLY WRONG TO APPLY RULES 9(A) AND 9(B) WHEN RESPONDENT HAS NEVER PURPORTED TO RELY UPON RULE 9(A), AND WHEN THE WARDEN HAS NOW SAID THAT HE DID NOT INTEND EVER TO RELY ON RULE 9(B)

It is not clear what authority the Eleventh Circuit found to dismiss this habeas corpus case. The rules governing these cases clearly express the definition of "abuse of the writ." There is no case that extends another "abuse" rule beyond Rule 9(a) and Rule 9(b).<sup>5</sup>

While there have been some shifting sands in the positions taken by the Warden, all along the State has refused to rely on Rule 9(a) in arguing to vacate the stay.<sup>6</sup> After recognizing that Rule 9(b) was facially inapplicable,<sup>7</sup> the Warden has now insisted that he never intended to rely on this argument either:

Respondent moved to dismiss the petition, not under the principles of Rule 9(b) or Rule 9(a), but based on the equitable principles governing habeas corpus actions.

\* \* \*

5. Gomez v. United States District Court, 112 S. Ct. 1652 (1992), the only case that comes remotely close to discussing the "equity" argument subsequently critiqued by Justice Scalia in Collins v. Byrd was, of course, and § 1983 case brought by an inmate who had enjoyed multiple habeas petitions prior to that point. It was not governed by the Rules Governing § 2254 Cases.

6. It is important to note that the State has not even attempted to prove the requisite prejudice to meet the requirements of Rule 9(a) and that issue is simply not before the Court at this time. See State's Motion to Dismiss, at 24 (requesting a hearing on prejudice if the question of Rule 9(a) is deemed to have any merit). For reasons set out below, it is clear that no such showing of prejudice could be made.

7. The pleadings from the District Court have been lodged with this Court and Petitioner will not reiterate all of them. Suffice it to say any reasonable jurist would agree that under current law Rule 9(b) has no application to this case.

Although Respondent raised laches below to avoid waiving that defense should particularized prejudice become apparent in addressing the merits of any issues, the Rules Governing Section 2254 Cases were not the basis for Respondent's argument. Respondent does not assert that he has shown particularized prejudice, but that the delay should be considered in evaluating the equities in this case.

Respondent also has not relied on Rule 9(b), but again, on the equitable principles cited by the district court and in the pleadings below.

See Emergency Motion (in the Eleventh Circuit) to Vacate Stay of Execution, at 4 & 10 (filed June 29, 1995) (emphasis supplied) (hereinafter referred to as Warden's XI Motion).

The Eleventh Circuit was therefore barred from predicated a dismissal on these rules. As Professor Liebman has noted, the traditional rule was that abuse of the writ was an affirmative defense to be claimed by the State. "Any doubts about the vitality or significance of the traditional rule . . . were laid to rest by the Supreme Court's 1991 decision in McCleskey v. Zant." See Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, Vol. 2, at 911 (2d Ed. 1994) (citing McCleskey v. Zant, 111 S. Ct. 1454 (1991)). The Supreme Court clearly held that "the government bears the burden of pleading abuse of the writ." Id. at 1470.

What was formerly the majority rule--that a federal court should not raise the issue of abuse *sua sponte*--is now generally seen as the only rule. See Liebman, *op cit. supra*, at 911-12. Any Eleventh Circuit ruling to the contrary would be contrary to the law. Certainly, it cannot be said that every reasonable jurist would rule against the law. A stay is therefore appropriate.

C. THE ONLY AVENUE LEFT TO WARDEN THOMAS IS THEREFORE THE NOVEL AND AMORPHOUS "EQUITY EXCEPTION" TO THE WRIT OF HABEAS CORPUS PROPOSED BELOW, WHICH FINDS NO LEGAL SUPPORT AMONG REASONABLE JURISTS AT ALL

After recognizing that neither Rule 9(a) nor Rule 9(b) is applicable, the Warden was reduced solely to a novel proposition that there should be another judicial exception to the right to habeas corpus relief, based on the Warden's amorphous "principles of equity." See Warden's XI Motion, at 9. The Warden concedes "the unavailability of a case directly on point." Id. In fact, the Warden does not suggest a case peripherally on point, but cites only to cases that deal with Rule 9(b). To analogize to the equity required of state courts, before it can be applied to bar relief a "procedural rule must be 'clearly announced to defendant and counsel.'" Wheat v. Thigpen, 793 F.2d 621, 625 (5th Cir. 1986) (quoting Henry v. Mississippi, 379 U.S. 443, 448 n.3, 85 S. Ct. 564, 567 n.3, 13 L. Ed. 2d 408 (1965)). Petitioner had no fore-warning that this novel rule might be sprung on him.

1. NO REASONABLE JURIST--LET ALONE ALL OF THEM--WOULD POSIT THAT SUCH A RULE CURRENTLY EXISTS

First, prior to the Eleventh Circuit opinion, no jurist had announced such a proposition. Second, as discussed above, Justice Scalia expressly noted the lack of support for this "rule" in Collins v. Byrd. Third, such a rule was specifically rejected by Congress when 28 U.S.C. § 2254 was enacted. See, e.g., Aiken v. Spalding, 684 F.2d 632, 633 (9th Cir. 1982) ("Congress indicated its disfavor for dismissals for delay under Rule 9(a) by eliminating from the proposed draft of the rule a rebuttable presumption of

prejudice that could be invoked by the state after a delay of five years.").

And fourth, any such "rule, it has been suggested, would risk violating the constitutional provision forbidding suspension of the writ except in times of war or rebellion." Liebman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, Vol. 2, at 702-03 (2d Ed. 1994) (citing authorities); see also id. at 181 n.66 (quoting Alexander Hamilton); Aiken v. Spalding, 684 F.2d 632, 633 (9th Cir. 1982) ("[l]iberal construction [of Rule 9(a)] also avoids a confrontation with the Suspension Clause of Art. I, § 9, of the United States Constitution").

Certainly, where the questions involved would seem to be so weighty, there is no authority to vacate a stay and fashion a novel rule on a couple of hours' notice and with forty-five minutes permitted for briefing. Again, while few reasonable jurists would admit the existence of Warden Thomas' novel "rule of law," certainly a stay should be granted prior to adopting it.

2. REASONABLE JURISTS SHOULD CERTAINLY PAUSE BEFORE PREDICATING SUCH A RULE ON THE PURPORTED INTENTIONS OF THE LITIGANT IN FILING A PATENTLY MERITORIOUS PETITION FOR FEDERAL HABEAS CORPUS RELIEF

Warden Thomas has argued--with undeniable imagination--that one focus of this novel rule of equity should be why Larry Lonchar plans to litigate his federal constitutional rights. The Eleventh Circuit adopts this argument, opining without any support in the petition that "Lonchar does not explain why this court should entertain a habeas petition that is explicitly brought to delay his



execution, not to vindicate his constitutional rights." See Exhibit A, at 7.

This is simply not the case. The unrebutted testimony in the lower court was that Larry Lonchar did wish to vindicate his constitutional rights. What does the Eleventh Circuit suggest? That when Larry Lonchar said that he meant to challenge his conviction and sentence, he actually meant that he did not? That a waiver may be found beyond a reasonable doubt when the petitioner expressly says that he does not mean to waive his rights? This is a novel rule of law indeed. Cf. Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410 (1986) (State must bear burden of showing waiver "made with a full awareness both of the right being abandoned and the consequences of the decision to abandon it").

Larry Lonchar had previously seen no worthwhile reason to avoid death. Now he has finally seen that his litigation could achieve broader purposes than to save his own life. This does not, of course, mean that he is insincere about winning his case. Indeed, he explicitly agreed to litigate all issues presented:

Q. Let me ask you this, Mr. Lonchar. You, your attorneys, have filed a petition in court that contains 59 pages, and you signed the verification that you have personal knowledge of the allegations in the Petition for Writ of Habeas Corpus, and that they are true and correct, and that you seek the relief requested in there. Did you sign that verification, I assume?

A. Yes, Your Honor.

\* \* \*

Q. Now, I understand your point with regard to the question of the manner of execution so that you can donate your organs, that's the point you were making to me a moment ago; is that correct?

A. That's correct.

Q. Now, a great deal of the petition goes far beyond that, and alleging irregularities and violations of your rights that would affect both your sentence and conviction and your sentence of execution in a prior state court proceeding. It is your wish to pursue those claims through a petition for Federal Habeas Corpus Relief? Do you understand my question.

A. Yes, Your Honor. Personally, I have to agree that I have to pursue this position to follow on what I would like to do, so I would have to say to the Court that, yes, I do.

(F.H.T. at 18-19)

Judge Camp felt that Mr. Lonchar's major motivation behind his litigation was to use his case as a vehicle for systemic change, to abolish the Electric Chair and provide inmates on Death Row with an option to save other lives, if in fact their executions could not be averted. Judge Camp explicitly did not find, however, that this vitiated the good faith with which the rest of the petition was to be litigated. Such a finding would have been entirely insupportable.

While the Warden does advert to this in passing as an element of his novel rule, it should be emphasized that Larry Lonchar's motives in litigating all the issues in his case are not relevant to what the outcome will actually be. On the face of the petition, it would probably be true to say that he has more chance of winning



the challenge to his conviction than to change the method of execution.<sup>8</sup>

It is true, but entirely irrelevant to the merits of the claims, that Larry Lonchar filed his 1993 state habeas petition to avoid his brother's suicide. (F.H.T. at 19) Now, one precipitant for Mr. Lonchar going along with his appeals is that he sees some chance that his litigation will help others, "all of these people's lives involved. . . ." (F.H.T. at 21) In another case, it might be that a petitioner believed that his mother would be happy at his pursuing his appeals. In another case, his motivation might be his desire to watch the N.B.A. finals for many years to come. These motives are simply not relevant to whether there is merit to the claims presented, and whether the claims may result in one type of relief (changing the method of execution) or another (vacatur of his convictions and sentences) is not relevant to the fact that such relief is being sought.

Certainly, it must be said that reasonable jurists should think long and hard before prying open the attorney-client privilege to ascertain why a petition is filed for habeas corpus relief. Professor Liebman has published two volumes on habeas corpus

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8. That is not to say, of course, that counsel's advice that pending litigation could precipitate political change would be false. However, clear precedent from this Court indicates that Mr. Lonchar will also, or alternatively, receive a new trial since he was not present for much of his first trial. This is a capital case and under the authority of "Diaz and Hopt . . . a capital defendant's right to presence is nonwaivable." Proffitt v. Wainwright, 685 F.2d 1227, 1258 (1982), modified on rehearing, 706 F.2d 311 (11th Cir. 1983); accord Hall v. Wainwright, 733 F.2d 766, 775 (11th Cir. 1984).

litigation, and finds no reported decision has yet made this an element of the analysis. Reasonable jurists should pause before doing so, too.

**D. REASONABLE JURISTS COULD (AND CERTAINLY WOULD) FIND THAT RULE 9(A) HAS NO APPLICATION TO THIS CASE, EVEN WERE THE WARDEN TO ASSERT PREJUDICE FROM LARRY LONCHAR'S ACTIONS**

Although he has never pressed his Rule 9(a) arguments, the Warden seems to be arguing that Larry Lonchar achieved some "strategic or tactical advantage" by filing his federal habeas petition within minutes of the denial of his state proceedings. If this were true, Larry Lonchar would be an inadequate strategist, or a bad tactician.

Larry Lonchar's case was affirmed on direct appeal on July 13, 1988. See Lonchar v. State, 258 Ga. 447, 369 S.E.2d 749 (1988), cert. denied, 488 U.S. 1019 (1989). There are a total of sixteen inmates on Georgia's Death Row whose death sentences were affirmed prior to that date, and who are not in federal court. There are a total of 36 inmates (one of whom has two death sentences from separate trials) on Georgia's Death Row who have had their death sentences affirmed on direct appeal since that date, and none is in federal court. It is clear, then, that Larry Lonchar's actions have not only failed to prejudice the State by delaying his litigation, but they have resulted in the most expeditious consideration of any person currently in Warden Thomas' custody.

It is very clear that Larry Lonchar has neither intended to secure such an advantage, nor has he in fact done so. Even were

Warden Thomas to argue that Rule 9(a) applied to this case, and plead specific prejudice, he would not prevail.

**E. REASONABLE JURISTS COULD (AND CERTAINLY WOULD) FIND THAT RULE 9(B) HAS NO APPLICATION TO THIS CASE, EVEN WERE THE WARDEN TO ASSERT THIS DEFENSE**

It would be a very strained interpretation of Rule 9(b) that would apply it to this case.

**1. REASONABLE JURISTS WOULD FIND THAT RULE 9(B) HAD NO APPLICATION TO THIS CASE SINCE THIS IS NOT A SUCCESSIVE CLAIM FOR RELIEF**

The State of Georgia has admitted, and the District Court found, that: 1) this is Mr. Lonchar's first federal Petition for a Writ of Habeas Corpus; and 2) Mr. Lonchar has not previously had a hearing on the merits of the claims set forth in this petition in the federal courts. The State has now conceded that Rule 9(b) has nothing to do with this case.<sup>9</sup>

On its plain face, Rule 9(b) simply does not apply to this case:

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner

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9. The doctrine of abuse, based on the analogous state law prohibition of successive petitioner, was never even argued in state court, although Mr. Lonchar had previously filed and dismissed a state habeas petition. The provisions of state law are indistinguishable from Rule 9(b)--claims will be barred unless the court "finds grounds for relief asserts therein which could not reasonably have been raised in the original . . . petition." O.C.G.A. § 9-14-51. This was not even pled in state court, let alone found.

to assert those grounds in a prior petition constituted an abuse of the writ.

Rule 9(b), Rules Governing Section 2254 Cases (emphasis supplied).

There has been no prior petition filed by Larry Lonchar in this case. Neither has there been any "prior determination . . . on the merits" of any of his claims. Rule 9(b) simply has no application to this case.

Throughout Respondent's motion to dismiss, reference was made to waiver of the right to a hearing "on a successive application" for federal habeas relief. Respondent's Motion, at 9 (quoting Darden v. Dugger, 825 F.2d 287, 294 (11th Cir. 1987) (emphasis supplied). The Potts case was likewise a successive petition, where Potts had previously dismissed his own federal pleadings. See Potts v. Zant, 638 F.2d 727, 740-41 (5th Cir. Unit B, 1981). In the case upon which Respondent has placed primary reliance--McCleskey v. Kemp, 111 S. Ct. 1454 (1991)--the Court dealt with McCleskey's "second federal habeas petition." Id. at 1457.

Unless counsel's preliminary research proves to be way off the mark, this Court will find no case that has ever applied Rule 9(b) to the first petition for federal relief filed by any inmate, much less one under sentence of death. This Court will likewise find no case that has ever applied Rule 9(b) to a petition filed by the inmate after the denial--not on the merits of any issue--of a next-friend's petition (opposed rather than authorized, by the inmate) for lack of standing.

Reasonable jurists would find that Rule 9(b) has no bearing on this case. Any contrary ruling would flout the law as we know it.



2. REASONABLE JURISTS WOULD NOT HOLD LARRY LONCHAR TO ACCOUNT FOR THE ACTIONS OF HIS "NEXT FRIEND" WHO ACTED WITHOUT HIS AUTHORIZATION AND WHO WAS FOUND TO HAVE NO STANDING TO FILE ANYTHING

There is no case that holds a Petitioner to account for the actions of an unauthorized "next friend" who takes steps that are actively opposed by the inmate. This is for obvious reasons: Assume for one moment that Mr. Lonchar's sister hated him, rather than loved him, and filed a "federal petition" before the exhaustion of state court remedies. Could this unauthorized action lead to the dismissal of the first real federal petition that Mr. Lonchar might later file? Of course not. Merely because his sister purported to have his best interests at heart, this would not justify imputing her allegations to him.

Indeed, the focus must be on federal litigation, there never was a prior petition filed by a person with standing, and the federal petition in question here was filed within 24 hours of the exhaustion of such remedies as the State of Georgia saw fit to provide.<sup>10</sup> There is no case that holds that the prior unauthorized petitions bar Mr. Lonchar now.

Certainly, this is something on which reasonable jurists could differ, if they did not all side with Petitioner. Such authority as there is that discusses the issue supports Petitioner's posi-

10. If Mr. Lonchar had "adopted" the federal next-friend petition that someone else filed, he would not have been able to secure federal relief at that time. Rather, he would have been sent back to state court to exhaust his claims, since he had never completed his first state court post-conviction proceeding. He has only now done so, and he cannot be legally faulted for not bringing his federal petition before Monday--immediately upon exhaustion of his state court remedies.

tion. In Potts the Eleventh Circuit suggested that there was a problem with "reliance on evidence presented in a [next-friend] suit to which Potts was not a party. We conclude the court erred in relying on evidence presented in the 'next friend' hearing and that such error requires a remand." Potts v. Zant, 638 F.2d 727, 750 (5th Cir. Unit B, 1981).

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court enter an order staying Larry Lonchar's execution pending the filing and disposition of a Petition for a Writ of Certiorari in this case.<sup>11</sup>

Respectfully Submitted,

BY:

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COUNSEL FOR PETITIONER

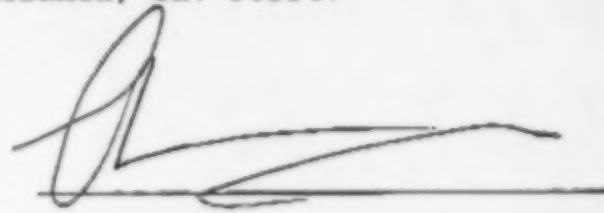
11. Counsel is working on such a petition now. However, with such weighty issues there clearly has not been time to do this in the minutes since the announcement of the extraordinary ruling of the Eleventh Circuit.



Certificate of Service

I hereby certify that I have this day served a copy of the foregoing pleading upon Mary Beth Westmoreland, Assistant Attorney General, 132 Judicial Building, Atlanta, Ga. 30334.

This 29th day of June, 1995.



A-2

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

No. 95-8821

LARRY GRANT LONCHAR,

versus

ALBERT G. THOMAS, Warden,  
Georgia Diagnostic and  
Classification Center,

Respondent-Appellant.

Appeal from the United States District Court  
for the Northern District of Georgia

Before TJOFLET, Chief Judge, COX and DUBINA, Circuit Judges.

BY THE COURT:

Albert Thomas, warden of the Georgia Diagnostic and Classification Center, has filed an emergency motion to vacate the district court's indefinite stay of the execution of Larry Grant Lonchar. Lonchar has responded to the motion. For the reasons given below, we vacate the stay.

PUBLISH

FILED  
U.S. COURT OF APPEALS  
ELEVENTH CIRCUIT

JUN 29 1995

MIGUEL J. CORTEZ  
CLERK

Petitioner-Appellee,

## I. Procedural History

An explanation of our ruling must begin with a review of the procedural history of Lonchar's case.<sup>1</sup> Lonchar's conviction for murder and sentence of death were affirmed on direct appeal in July 1988, and the Supreme Court denied certiorari in January 1989. Lonchar v. State, 369 S.E.2d 749 (Ga. 1988), cert. denied, 488 U.S. 1019 (1989). Lonchar refused to file a collateral attack on his own, and his execution was scheduled for March 1990. His sister, Chris Kellogg, then petitioned a Georgia superior court for habeas corpus. Finding Lonchar competent to bring a petition on his own, the superior court dismissed the petition for lack of standing. The Georgia Supreme Court denied a certificate of probable cause to appeal the decision. Kellogg v. Zant, 390 S.E.2d 839, cert. denied, 498 U.S. 890 (1990). Lonchar's sister then filed a 28 U.S.C. § 2254 petition in federal district court. Finding after a full evidentiary hearing that Lonchar was competent, the district court dismissed the petition for lack of standing, and this court affirmed. Lonchar v. Zant, 978 F.2d 637 (11th Cir. 1992), cert. denied, 113 S. Ct. 1378 (1993). Lonchar opposed the petition and so stated before the federal district court.

Following the failure of his sister's petitions, the State scheduled Lonchar's execution for February 24, 1993. That day, Lonchar consented to the filing of a petition for habeas corpus in his own name in Georgia superior court. The superior court stayed

<sup>1</sup> This procedural history is taken from records on file in this court from this and prior proceedings.

the execution. A few months later, Lonchar sought to dismiss the petition. Finding Lonchar competent to waive his rights, the superior court dismissed the petition without prejudice. The Georgia Supreme Court denied Lonchar's attorneys' motion for certificate of probable cause to appeal.

On June 9, 1995, an execution order was entered for Lonchar's execution between noon Friday, June 23, 1995 and noon Friday, June 30, 1995. The execution was scheduled for 3:00 P.M., June 23, 1995. On June 20, 1995, Lonchar's brother, Milan Lonchar, Jr., sought habeas relief on Lonchar's behalf. After a hearing at which Lonchar declared his opposition to the petition and his wish to die, the Georgia superior court found Lonchar competent and dismissed the petition for want of standing. Lonchar v. Thomas, No. 95-V-128 (Super. Ct. Butts County June 21, 1995). The Georgia Supreme Court denied Lonchar's brother a certificate of probable cause to appeal. Lonchar's brother was similarly unsuccessful in federal district court. Lonchar v. Thomas, No. 1:95-CV-1600-JTC (N.D. Ga. June 22, 1995). On June 23, this court denied a certificate of probable cause to permit his brother to appeal the dismissal. Lonchar v. Thomas, No. 95-8799 (11th Cir. June 23, 1995). The U.S. Supreme Court denied certiorari. Lonchar v. Thomas, No. 94-9773 (U.S. June 23, 1995).

On June 23, however, the day his execution was scheduled, Lonchar again--as he had on the day of his scheduled execution in 1993--consented to the filing of a petition for habeas corpus in his name and a complaint under 42 U.S.C. § 1983. The Butts County



Superior Court temporarily stayed the execution. At a hearing in Butts County, Lonchar informed the judge that he did not want a writ of habeas corpus. (Tr. of 6/23/95 hr'g at 6-7.) Lonchar explained that he still wished to be executed, but he hoped to delay the execution long enough for the Georgia legislature to consider changing Georgia's method of execution from electrocution to lethal injection, so that Lonchar could donate his organs. (Id.) The state court dismissed the habeas petition on June 26, 1995, essentially finding that it was an abusive writ brought for manipulative purposes. Lonchar v. Thomas, Nos. 95-V-332, 335 (Super. Ct. Butts County June 26, 1995). On June 27, the Supreme Court of Georgia denied Lonchar's application for a certificate of probable cause to appeal the dismissal. Lonchar v. Thomas, Nos. 895R1545, 895M1512 (Ga. June 27, 1995).

Lonchar's execution was rescheduled for 3:00 P.M. June 28, 1995. On June 27, Lonchar filed in his own name a 28 U.S.C. § 2254 petition in the district court. The State moved to dismiss the petition. The district court first temporarily stayed the execution to consider the State's motion; later on June 28 the court entered an indefinite stay to reach the merits of the petition. Lonchar v. Thomas, No. 1:95-CV-1656-JTC (N.D. Ga. June 28, 1995). In the order granting the stay, the district court found that Lonchar has twice waited until the day of execution--despite having ample time before--to seek relief. The court also found that Lonchar not only neglected to seek relief, but explicitly refused in open court to do so. Finally, based on

Lonchar's statement at the hearing on Lonchar's petition, the court found that

[Lonchar's] purpose in asserting the claims is not to obtain a review of the constitutionality and possible errors in his sentence. His sole purpose in asserting the claims is to delay his execution so that the method of execution may be changed to allow him to donate his organs upon death.

(Order at 7.)

The district court concluded that Lonchar's conduct was an abuse of the writ. However, because this § 2254 petition is Lonchar's first, the court felt constrained by this court's precedent to deny the State's motion to dismiss for abuse of the writ. The court therefore denied the motion and granted a stay of execution. The State now moves this court to vacate that stay.

## II. Discussion

The writ of habeas corpus is governed by equitable principles, and the petitioner's conduct may thus disentitle him to relief. Sanders v. United States, 373 U.S. 1, 17, 83 S. Ct. 1068, 1078 (1963); Gunn v. Newsome, 881 F.2d 949, 954 (11th Cir. 1989) (en banc). Even when the petitioner follows procedural rules, the writ comes at a cost to finality and state sovereignty. McCleskey v. Zant, 499 U.S. 467, 496, 111 S. Ct. 1454, 1469-70 (1991). A petitioner's willful delay and manipulation of the judicial system exacerbate this cost. Thus,

[a]quity must take into consideration the State's strong interest in proceeding with its judgment and [the petitioner's] obvious attempt at manipulation. . . . A court may consider the last-minute nature of an



application to stay execution in deciding whether to grant equitable relief.

Gomez v. United States Dist. Court, \_\_\_ U.S. \_\_\_, 112 S. Ct. 1652, 1653 (1992). This is the case even apart from the subsequent-petition doctrine of abuse of the writ embodied in Rule 9 of the Rules Governing Section 2254 Petitions and addressed by McCleskey. The Gomez court made this clear: "Even if we were to assume . . . that [the petitioner] could avoid the application of McCleskey to bar his claim, we would not consider it on the merits. Whether his claim is framed as a habeas petition or § 1983 action, Harris seeks an equitable remedy." Id. at 1653. The equitable remedy of habeas therefore carries with it equitable doctrines, including the possibility that a petitioner's egregiously abusive conduct can bar relief even if it is the first time he seeks such relief.

The district court acknowledged these principles, but it believed that Davis v. Dugger, 829 F.2d 1513 (11th Cir. 1987), controlled the result in this case. We disagree. Even assuming that Davis remains good law after Gomez, it does not govern this case. In Davis, the State contended that the filing of a petition on the eve of execution by itself constituted an abuse of the writ. This court held "only that the fact that a scheduled execution is imminent does not itself create a basis for dismissing the petition as an abuse of the writ." Id. at 1521. The court based its holding exclusively on Rule 9 of the Rules Governing Section 2254 Cases; the court did not consider whether equitable doctrines

independent of Rule 9 permit a court to refuse to tolerate egregious abuse.<sup>1</sup>

Based on the principles of equity and the caselaw cited above, we view this case as one in which Lonchar has abused the writ. We need not be detained, however, by a debate over whether this case is properly characterized as one involving an abuse of the writ or simply a case involving abusive conduct and misuse of the writ. However the case is characterized, the district court findings show that Lonchar does not merit equitable relief. First, Lonchar has offered no good reason for his six-year refusal to pursue and exhaust his state collateral remedies and file a federal petition. Second, Lonchar presents no good excuse for his manipulative practice of consistently waiting until his day of execution to seek relief. Finally, Lonchar does not explain why this court should entertain a habeas petition that is explicitly brought to delay his execution, not to vindicate his constitutional rights. As was the case in Gomez, "abusive delay . . . has been compounded by last-minute attempts to manipulate the judicial process." Id.

<sup>1</sup> Davis in fact presented no case of egregious abuse. Although over a year passed between the U.S. Supreme Court's denial of certiorari on the direct appeal and Davis's first state collateral attack and § 2254 petition, this one-year delay was well within Florida's statute of limitations on state collateral relief. Davis, 829 F.2d at 1520 n.18. Furthermore, Davis had not been totally inactive; he had petitioned the state for clemency. Id. at 1520. The last-minute filing in Davis appeared to result more from Florida's conduct in scheduling an execution before Davis had an opportunity to seek collateral relief than from Davis's willful refusal to seek relief, as is the case here.

## III. Conclusion

The district court granted a stay of execution based on the erroneous conclusion that it could not dismiss the petition for Lonchar's abusive conduct. Because its granting of the stay was thus based on an erroneous determination of law, it was necessarily an abuse of discretion. Jones v. International Riding Helmets, Ltd., 49 F.3d 692, 694 (11th Cir. 1995). We accordingly VACATE the stay of execution.

Our mandate shall issue at 5:00 P.M. Eastern Daylight Time today.

STAY VACATED.

FILED IN CLERK'S OFFICE  
U.S.D.C.-Atlanta

JUN 28 1995

LUTHER D. THOMAS, Clerk  
By: *Debra J. Bankhe*  
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

Larry Grant Lonchar,  
Petitioner,

v.

A.G. Thomas, Warden  
Georgia Diagnostic and  
Classification Center,

Respondent.

CIVIL ACTION FILE NO.  
1:95-CV-1656-JTC

ORDER

Petitioner's sentences of death were affirmed on direct appeal. At the time of the first scheduled execution, a full round of next-friend petitions were brought which were denied for lack of standing in the state and federal courts.

Just prior to his execution in 1993, Petitioner agreed to file a state habeas action. This action was dismissed, without prejudice, pursuant to the Petitioner's request.

A second round of next-friend petitions were filed, which were denied in both the state and federal courts for lack of standing. Hours prior to the execution, Petitioner filed a full state habeas action. Judge Smith of the Superior Court of Butts County denied the petition, essentially finding that it was an abusive writ brought for manipulative purposes.

This matter now comes before this Court on the first habeas petition filed by Petitioner. Normally a prisoner is entitled to federal review of the conviction and sentence for errors of a constitutional magnitude. The petition presents significant constitutional issues concerning the validity of



FILED IN CLERK'S OFFICE  
U.S.D.C.-Atlanta

JUN 28 1995

LUTHER D. THOMAS, Clerk  
Deputy ClerkIN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

Larry Grant Lonchar,

Petitioner,

v.

A.G. Thomas, Warden  
Georgia Diagnostic and  
Classification Center,

Respondent.

CIVIL ACTION FILE NO.  
1:95-CV-1656-JTC

CAPITAL CASE

## ORDER

This action is presently before the Court on Petitioner's Petition for Writ of Habeas Corpus; on Petitioner's Motion for Stay of Execution; on Petitioner's Motion for Evidentiary Development; and on Respondent's Motion to Dismiss.

## I. STATEMENT OF CASE

Following a jury trial in Dekalb County Superior Court, Larry Grant Lonchar [hereinafter "Lonchar"] was convicted on three counts of malice murder for his participation in the deaths of Charles Wayne Smith, Steven Smith and Margaret Sweat. He was also convicted of aggravated assault, which occurred during the same incident as the murders, on Charles Richard Smith. Lonchar was sentenced to death by electrocution for the three murder convictions and was sentenced to twenty years on the aggravated assault conviction.

The sentences were automatically reviewed, pursuant to Georgia's automatic appeal procedure, and were affirmed. Lonchar v. State, 258 Ga. 447, 369 S.E.2d 749 (1988), cert. denied, 488

Petitioner's trial and sentence. None of these issues have been reviewed in an federal court proceeding. The State maintains Petitioner is precluded from filing his Petition because his actions have amounted to an abuse of the writ of habeas corpus. Petitioner, in this instance, may have waived the right to review. However, the issue of waiver requires further consideration. In view of the irrevocability of the death penalty, the Court GRANTS a temporary stay of execution so that this issue can be carefully considered. The State is HEREBY ORDERED to immediately STAY the execution of Larry Grant Lonchar until further order of this Court.

SO ORDERED, this 28 day of June, 1995.

*Jack T. Camp*  
FOR JACK T. CAMP  
UNITED STATES DISTRICT JUDGE



U.S. 1019 (1989). The first execution order was set for March 23-30, 1990.

Lonchar refused to bring any appeals on his convictions or sentence. As such, his sister, Chris Lonchar Kellogg [hereinafter "Kellogg"] brought a habeas corpus petition in the Superior Court of Butts County. Following a hearing into the matter, that court found Lonchar competent to waive his appeals. The Superior Court of Butts County then denied the motion for stay of execution and refused to allow Kellogg to proceed as next-friend.

The Supreme Court of Georgia dismissed the application for certificate of probable cause to appeal that decision. Kellogg v. Zant, 260 Ga. 182, 390 S.E.2d 839 (1990). The Supreme Court denied certiorari. Kellogg v. Zant, 498 U.S. 890, reh'g denied, 498 U.S. 1000 (1990).

A petition for habeas was then filed in this Court. This Court found that an evidentiary hearing into Lonchar's competency was required. Accordingly, the Court conducted a three-day hearing. Evidence, including various psychiatric opinions and evaluations of Lonchar and questioning of Lonchar by the Court, was considered.

The Court found Lonchar competent to waive his appeals. Specifically, the Court found that Lonchar understood his position and his options; that no evidence of significant psychotic episodes, substantial distortion of reality, bipolar disease or other mental disease of Lonchar was present in the record; and that

even though Lonchar suffered from depression and personality disorders, these problems did not affect his ability to rationally choose among his options. The Court consequently denied Kellogg standing to bring the next-friend petition. Lonchar v. Zant, Civil Action No. 1:90-CV-2336-JTC (Feb. 20, 1992). The Eleventh Circuit affirmed this Court's opinion. Lonchar v. Zant, 978 F.2d 637 (11th Cir. 1992). Certiorari was denied in the Supreme Court on February 24, 1993. Lonchar v. Zant, 113 S.Ct. 1378 (1993). Clemency was denied that same day by the State Board of Pardons and Paroles.

On February 24, 1993, the date of Lonchar's scheduled execution, Lonchar consented to the filing of a habeas petition in his case. A stay of execution was granted.

The habeas petition was assigned to the Honorable Kristina Cook-Connelly, Judge of the Superior Court of Butts County. Before a hearing was set down, Lonchar wrote letters dated September 13, 1993 and May 5, 1994 to the Judge indicating that he wished to fire his attorneys and withdraw his petition. Lonchar mailed similar letters to the Attorney General's Office in July of 1993.

A hearing was held on June 23, 1994. The Court questioned Lonchar and found him competent to withdraw his petition. The Court granted his request to dismiss the petition and to fire his attorneys on January 25, 1995. The dismissal of the petition was without prejudice. A Motion for Reconsideration, filed by Lonchar's former attorneys, was denied on February 23, 1995.

Lonchar's former attorneys next filed an Application for

Certificate of Probable Cause to Appeal. The Supreme Court of Georgia denied that application on April 6, 1995. A Motion for Reconsideration was filed, and was denied on May 4, 1995. On that same day, the Court also granted the State's Motion to Issue the Remittitur. On May 17, 1995, the remittitur was made the judgment of the Superior Court of Butts County.

On May 7, 1995, Lonchar hired attorney John Matteson to represent him.

A new execution order was signed on June 8, 1995. The execution window was established between the dates of June 23, 1995 and June 30, 1995. The Department of Corrections has set the date and time for the execution as 3:00 p.m. on June 23, 1995.

A next-friend petition was filed in the Superior Court of DeKalb County by Lonchar's brother, Milan. On June 20, 1995 Judge Mallis ruled that Milan Lonchar lacked standing to proceed. On June 22, 1995, the Supreme Court of Georgia affirmed this ruling.

On June 20, 1995, a habeas petition challenging Lonchar's competency was filed in the Superior Court of Butts County. A hearing was held on June 21, 1995. That Court denied Milan Lonchar standing to proceed as next-friend. On June 22, 1995, the Supreme Court of Georgia denied the Certificate of Probable Cause and the Motion for Stay of Execution in this action.

On June 22, 1995, this Court denied Milan Lonchar's next-friend habeas petition for lack of standing. The Eleventh Circuit affirmed on June 23, 1995.

On June 23, 1995, Larry Lonchar filed a full petition for

writ of habeas corpus in the Superior Court of Butts County. A short hearing was held. On June 26, 1995, Judge Smith of the Superior Court of Butts County denied the writ, based on a procedural bar and did not consider the merits of the petition. A motion for reconsideration was denied on June 27, 1995. The Supreme Court of Georgia affirmed on June 27, 1995.

Larry Lonchar has now filed a petition for writ of habeas corpus in this Court.

## II. FINDING OF FACTS

This Court held an evidentiary hearing to allow the parties to present evidence upon issues raised in Respondent's Motion to Dismiss. The parties agreed that the record before the Court also consists of the record in the next-friend petition filed on behalf of Lonchar (Lonchar v. Zant, Civil Action No. 90-CV-2336-JTC), the transcripts of hearings held in the State court habeas proceedings and orders entered in the State habeas proceedings. Based upon this record, the Court makes the following findings of fact.

Larry Lonchar is aware of the prior history of this litigation which is detailed in the Statement of the Case. Lonchar participated in an extensive evidentiary hearing held in the next-friend case in this Court. Id. The Court questioned Lonchar and found as follows:

Mr. Lonchar understands his options clearly: that federal habeas corpus is the last opportunity for him to obtain review of his sentence; that there are substantial arguments that his sentence should be overturned; and



that failure to pursue this option will result in his execution.

The Court concluded that Mr. Lonchar was competent to waive further review of his sentence, knowingly and voluntarily waived further review, and dismissed the next-friend petition on February 13, 1993.

Lonchar's execution was scheduled for February 24, 1993. Lonchar's attorney, Mr. Clive Stafford-Smith told Lonchar shortly before the execution that his brother would kill himself if the execution were carried out. As a result, Lonchar filed a petition in state court minutes before the scheduled execution.

Petitioner soon decided to withdraw the petition and wrote the state court judge requesting to dismiss his petition. He first requested that the petition be dismissed on September 13, 1993 in letters to the Judge. The state court entered an order dismissing the petition on January 25, 1995.

Lonchar was aware of the availability of habeas corpus relief during this entire period and had discussed it with his attorney. Lonchar offered no reason for his failure to pursue review of his sentence except that he chose not to do so. He was aware of the potential legal arguments and their factual predicates. Not only did he decline to pursue further review of his sentence, on at least three occasions he knowingly and voluntarily waived further review of his sentence in open court.

The execution was rescheduled for June 23, 1995. On June 20, 1995, his brother brought another next friend petition. Again

Lonchar declined to participate. Both the State and Federal courts dismissed the petition because of the lack of evidence that Lonchar was incompetent to make this decision. The Eleventh Circuit Court of Appeals decision was entered of June 23, 1995.

Within hours of his execution, Lonchar for the second time filed an application for writ of habeas in the State Courts. He agreed to file the petition after Mr. Stafford-Smith and his other attorneys advised him that the legislature might change the law to allow a different method of execution so that he could donate his organs.

The present petition is the first brought by Lonchar in Federal Court.

Lonchar is familiar with and wishes to assert the claims in his present habeas petition; however, his purpose in asserting the claims is not to obtain a review of the constitutionality and possible errors in his sentence. His sole purpose in asserting the claims is to delay his execution so that the method of execution may be changed to allow him to donate his organs upon death.

### III. CONCLUSIONS OF LAW

Lonchar files this habeas petition seeking review in this Court of possible constitutional errors arising from his trial and death sentence.

As a general rule, a district court shall entertain an application for a writ of habeas corpus by a person in the State's custody pursuant to the judgment of the State court if that application alleges federal constitutional errors. 28 U.S.C. § 2254.

In its Motion to Dismiss, Respondent raised the defense of abuse of the writ. The writ of habeas corpus is an equitable remedy, Gomez v. United States District Court, 112 S.Ct. 1652, 1653 (1992), which provides "a means by which the legal authority under which a person is detained can be challenged." Wright, Miller & Cooper, Federal Practice & Procedure § 4261 (1988).

The abuse of the writ doctrine arose as an equitable response to successive applications because res judicata principles are inapplicable to habeas corpus cases. McCleskey v. Zant, 111 S.Ct. 1454, 1463 (1991); Darden v. Dugger, 825 F.2d 287, 293 (1987), cert. denied, 485 U.S. 943 (1988). The doctrine is incorporated into Rule 9(b):

second or successive petition[s] may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits, or if new and different grounds are alleged, the judge finds that the failure to the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Rule 9 (b), Rules Governing § 2254 Cases. Thus under the abuse of the writ doctrine, a habeas petitioner may be denied review of his alleged constitutional errors where successive writs are filed. "Nothing in the traditions of habeas corpus review requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass or delay." Sanders v. United States, 373 U.S. 1, 18 (1963).

Under the abuse of the writ doctrine the State must plead an abuse of the writ with particularity. McCleskey v. Zant, 111 S.Ct. 1454 (1991). This burden is satisfied where the State notes

the petitioner's prior writ history, identifies the claims which appear for the first time, and alleges that petitioner has abused the writ. Id. at 1456. The State, in this instance, has met that burden.

The State has shown that despite 8 years of litigation over these claims, and numerous opportunities to join in the litigation, Lonchar has explicitly refused to bring these claims. In fact, in the first next-friend petition, the Court found that Lonchar made a voluntary and knowing waiver of his right to appeal on the claims. In this petition, Lonchar brings the same claims, with the exception of the claim on the method of execution, that have been brought in the prior next-friend petitions.

Further, the State alleges that Lonchar brings these claims solely for the purpose of delay. That allegation is supported by Lonchar's own testimony at the evidentiary hearing conducted in this case,

Once the State meets its burden, the burden shifts to the Petitioner to explain the reasons that make it "fair and just for the Court to overlook the delay." McCleskey, 111 S.Ct. at 1464. Petitioner must show "cause -- e.g. that he was impeded by some objective factor external to the defense, such as governmental interference or the reasonable unavailability of the factual basis for the claim -- as well as actual prejudice resulting from the errors of which he complains." Id. at 1456-57.

Lonchar fails to come forward with either objective or



subjective reasons to excuse the conduct.<sup>1</sup> Lonchar previously had the opportunity to obtain collateral review of all the present issues and voluntarily declined to do so. Petitioner's reason for not raising the claims asserted in his habeas petition sooner are that he has just recently been convinced that he may be able to do some good by offering his organs for donation following his execution. This is not sufficient reason for failing to raise these issues when he previously had the opportunity to do so. Lonchar's failure to raise these issues earlier is certainly inexcusable negligence, if not voluntary abandonment.

The rule which authorizes dismissal for abuse of the writ, however, only applies to successive petitions. See McCleskey, 111 S.Ct. 1454; Rule 9(b). The Court has been unable to find any case where petitioner's first petition for habeas corpus seeking review of constitutional errors in the federal courts has been dismissed for abuse of the writ.

The present petition is the first habeas petition filed in federal Court by Lonchar personally. The issue then is whether a first federal habeas petition filed at the eleventh hour for the purpose of delay and resulting from inexcusable negligence in not seeking earlier review can be dismissed as an abuse of the writ.

The purposes of the abuse of the writ doctrine would be served by affording full effect to the doctrine in this instance. One of the law's objects is finality of judgments. McCleskey, 111

<sup>1</sup> The Court has considered the proffer of evidence put on by Lonchar, as well as his testimony in making this determination.

S.Ct. at 1468. Allowing manipulation of the system defeats this interest. Disrespect for the judicial system arises when manipulation of the system is allowed to endlessly extend the appeals so that there is no finality. Further, without finality, no deterrent effect flows from the penalty. McCleskey, 111 S.Ct. at 1468. Finally, deference to the State's enforcement of its laws is validated by adhering the abuse of writ doctrine where this degree of manipulation has been observed.

Despite strong policy and equitable reasons which support the doctrine, the Eleventh Circuit's holding in Davis v. Dugger, 829 F.2d 1513 (11th Cir. 1987) indicates it does not apply to a first petition. In that case, the Eleventh Circuit reversed the District Court's ruling that there was an abuse of a writ on a first habeas petition where the abuse arose from the intentional delay of filing of the writ until just prior to the execution. The Eleventh Circuit determined that the petition could not be dismissed under the traditional abuse of the writ doctrine embodied in Rule 9(b) because that rule is expressly limited to successive writs. Id. at 1518. The Court determined that a first petition could not constitute a successive writ. Id.

Rule 9(b) of the Rules Governing § 2254 Cases codifies the common law concerning abuse of the writ, as was stated in Sanders v. United States, 373 U.S. 1 (1962). Neither the Rule nor the common law allow application of the doctrine where there is no successive petition.

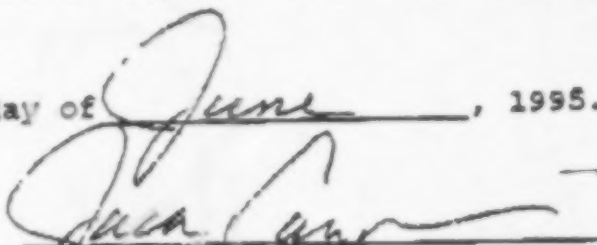
For that reason, although the Court finds that

Petitioner's conduct otherwise constitutes an abuse of the writ, since it is a first petition, the Court feels constrained to deny the Motion to Dismiss based on abuse of the writ.

IV. CONCLUSION

For the foregoing reasons, Respondent's Motion to Dismiss on the above ground is DENIED. Petitioner's Motion for Stay of Execution is GRANTED; Petitioner's Motion for Evidentiary Development is DENIED AS MOOT.

SO ORDERED, this 28 day of June, 1995.

  
JACK T. CAMP  
UNITED STATES DISTRICT JUDGE

0:11lenchar.2



EDITOR'S NOTE

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

NO. A

LARRY GRANT LONCHAR,

Petitioner-"Appellee"

-vs-

WALTER ZANT, Warden,  
Georgia Diagnostic and  
Classification Center,

Respondent-"Appellant"

REPLY IN OPPOSITION TO  
RESPONDENT-"APPELLANT'S" CHALLENGE  
TO STAY ENTERED BY JUDGE CAMP

Petitioner, Larry Grant Lonchar, by his undersigned counsel,  
believing that his case has merit and raises substantial constitu-  
tional questions, hereby opposes the application to vacate the stay  
entered by Judge Camp that was entered at 9:48 p.m., on June 29,  
1995.

I. WHILE THE WARDEN HAS FILED A "NOTICE OF  
APPEAL" THE ISSUES BEFORE THE LOWER COURT ARE  
NOT APPEALABLE

The Warden, while he is referred to as "Appellant",<sup>1</sup> is  
asking this Court to vacate the stay of execution entered by Judge

<sup>1</sup> The inverted commas are used since, although he has filed  
a "Notice of Appeal," Warden Thomas may not legitimately bring an  
appeal to this Court. The only jurisdictional basis for seeking  
relief from the lower court ruling at this juncture is through a  
motion to vacate the stay of execution.

1A pp

Camp after the hearing held yesterday afternoon. It is clear that this Court does not have jurisdiction to entertain an appeal, as such, and that the Warden's application may only be entertained as a motion to vacate the stay.

#### Jurisdiction

The District Court's Order denying the state's motion to dismiss on abuse of writ grounds does not constitute an appealable "final" order, and this Court cannot consider the Warden's notice of appeal for lack of jurisdiction. See F.R.A.P. 3 & 5; 28 U.S.C. §§ 1291 & 1292(b). Pursuant to 28 U.S.C. § 1291, only "final decisions" of the district court may be appealed to the Court of Appeals. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). In this case, the District Court's order denying the state's motion to dismiss begins the litigation of the merits of this case in federal court.

Instead, the denial of the motion to dismiss on abuse of writ grounds is an issue suitable only for interlocutory appeal, which may not be granted in the absence of a statement from the District Court under 28 U.S.C. § 1292(b). No such statement has been sought by Respondent or conferred by the District Court, and the District Court has effectively acknowledged that there is no "substantial ground for difference of opinion," 28 U.S.C. § 1292(b), since neither the Court nor counsel have found a case where abuse of writ has been applied to a dismiss a first federal habeas petition.

#### II. THE ONLY ISSUE PROPERLY BEFORE THIS COURT IS THE PATENT PROPRIETY OF JUDGE CAMP'S STAY ORDER

The only question before this Court is whether a stay is appropriate. Because of the obviously drastic results of the denial of a stay, and the relatively insignificant prejudice to the State when a stay is granted, the burden now rests upon the Warden to "demonstrate that the issues [presented in the petition] are [not] debatable among jurists of reason," or that the issues presented "are [not] 'adequate to deserve encouragement to proceed further.'" Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983) (citations omitted).

The Warden has simply cited no case that comes close to suggesting that Mr. Lonchar should be denied a stay. The "novel" rule of habeas corpus litigation proposed by the Warden essentially asks this Court to spontaneously and judicially create a bar to habeas corpus relief that goes far beyond Rules 9(a) and 9(b) to the Rules Governing Habeas Corpus Actions. This bar would be one that has no precedent in the law, and that was never announced to Larry Lonchar as a litigant to give him fair notice of the hidden barrier reef that might sink his entirely legal ship.

The record indicates that Larry Lonchar has been told by State Court Judge Connelly, by Federal District Judge Camp, by counsel and--periodically--by counsel for the Warden<sup>2</sup> that relief would be

<sup>2</sup> Counsel for the Warden seemed to shift another position yesterday announcing that no such assurance had been made with respect to federal court. However, in state court counsel announced that there had been no "specific waiver on the record in any particular proceeding." (6/23/95 Hrg. at 21) (emphasis supplied) To the extent that counsel now argues that there was



available should he elect to proceed with his appeals. It would be fundamentally inequitable to create a novel rule now in the heat of the moment that would result in the execution of Larry Lonchar within hours.

**A. THERE HAS BEEN NO DISCUSSION OF RULE 9(A), NOW THE WARDEN DENIES RELIANCE ON RULE 9(B), AND THE STATE HAS CITED NO CASE THAT PROVIDES A BAR TO FEDERAL HABEAS CORPUS RELIEF BEYOND THESE TWO PROVISIONS**

There have been some shifting sands in the position taken by the Warden, as it has become apparent that each argument is without merit. It is true that all along the State has not relied on Rule 9(a) in arguing to vacate the stay.<sup>3</sup> Now, after recognizing that Rule 9(b) is also facially inapplicable,<sup>4</sup> the Warden has backed off this argument also.

We are now reduced solely to a novel proposition that there

such a waiver in federal court, counsel apparently refers to the prior federal proceedings where Judge Camp discussed the possibility of Mr. Lonchar's "waiv[ing] any appeals on [his] behalf in federal court or otherwise." (11/14/91 Hrg. at 437) (emphasis supplied) It would seem that this would, were it really a waiver, operate in both state and federal court. However, it would seem still clearer that there was no such waiver since Judge Camp went on to advise Mr. Lonchar that "you can change your mind up until the time, of course, sentence is executed, and bring a petition for habeas corpus." *Id.* at 443.

<sup>3</sup> It is important to note that the State has not even attempted to prove the requisite prejudice to meet the requirements of Rule 9(a) and that issue is simply not before the Court at this time. *See State's Motion to Dismiss*, at 24 (requesting a hearing on prejudice if the question of Rule 9(a) is deemed to have any merit). For reasons set out below, it is clear that no such showing of prejudice could be made.

<sup>4</sup> The pleadings from the District Court have been lodged with this Court and Petitioner will not reiterate all of them. Suffice it to say that reasonable jurists could not differ that under current law Rule 9(b) has no application to this case.

should be another judicial exception to the right to habeas corpus relief, based on the Warden's amorphous "principles of equity." *See Warden's Motion*, at 9. The Warden concedes "the unavailability of a case directly on point." *Id.* In fact, the Warden does not suggest a case peripherally on point, but cites only to cases that deal with Rule 9(b).

Not only have no jurists yet announced such a proposition, but any such "rule, it has been suggested, would risk violating the constitutional provision forbidding suspension of the writ except in times of war or rebellion." Liebman, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE*, at 702-03 (1994) (citing authorities); *id.* at 181 n.66 (quoting Alexander Hamilton); *Aiken v. Spalding*, 684 F.2d 632, 633 (9th Cir. 1982) ("[l]iberal construction [of Rule 9(a)] also avoids a confrontation with the Suspension Clause of Art. I, § 9, of the United States Constitution).

Certainly, there is no authority to vacate a stay under circumstances such as these.

**B. THE WARDEN ASSERTS NO PREJUDICE FROM LARRY LONCHAR'S ACTIONS, AS IS CLEARLY BORNE OUT BY THE FACT THAT MR. LONCHAR HAS ENTERED FEDERAL COURT BEFORE ANY SIMILARLY-SITUATED GEORGIA DEATH ROW INMATE**

Although he has now abandoned his Rule 9(b) arguments, the Warden seems to be arguing that Larry Lonchar achieved some "strategic or tactical advantage" by filing his federal habeas petition within minutes of the denial of his state proceedings. If this were true, Larry Lonchar would be an inadequate strategist, or a bad tactician.

Larry Lonchar's case was affirmed on direct appeal on July 13,



1988. See Lonchar v. State, 258 Ga. 447, 369 S.E.2d 749 (1988),  
cert. denied, 488 U.S. 1019 (1989). There are a total of sixteen  
inmates on Georgia's Death Row whose death sentences were affirmed  
prior to that date, and who are not in federal court. There are a  
total of 36 inmates (one of whom has two death sentences from  
separate trials) on Georgia's Death Row who have had their death  
sentences affirmed on direct appeal since that date, and none is in  
federal court. It is clear, then, that Larry Lonchar's actions  
have not only failed to prejudice the State by delaying his  
litigation, but they have resulted in the most expeditious  
consideration of any person currently in Warden Thomas' custody.

It is very clear that Larry Lonchar has neither intended to  
secure such an advantage, nor has he in fact done so.

**C. WHILE LARRY LONCHAR'S MOTIVATION IN FILING  
A FEDERAL PETITION IS NOT RELEVANT TO THIS  
DECISION, IT IS CLEARLY NOT THE CASE THAT  
HE ONLY INTENDS TO PURSUE THE CHANGE IN  
METHOD OF EXECUTION**

The un rebutted testimony in the lower court was that Larry  
Lonchar had finally seen that his litigation could achieve broader  
purposes than to save his own life, so he had agreed to litigate  
all issues presented:

Q. Let me ask you this, Mr. Lonchar. You,  
your attorneys, have filed a petition in court  
that contains 59 pages, and you signed the  
verification that you have personal knowledge  
of the allegations in the Petition for Writ of  
Habeas Corpus, and that they are true and  
correct, and that you seek the relief  
requested in there. Did you sign that  
verification, I assume?

A. Yes, Your Honor.

\* \* \*

Q. Now, I understand your point with regard  
to the question of the manner of execution so  
that you can donate your organs, that's the  
point you were making to me a moment ago; is  
that correct?

A. That's correct.

Q. Now, a great deal of the petition goes far  
beyond that, and alleging irregularities and  
violations of your rights that would affect  
both your sentence and conviction and your  
sentence of execution in a prior state court  
proceeding. It is your wish to pursue those  
claims through a petition for Federal Habeas  
Corpus Relief? Do you understand my question.

A. Yes, Your Honor. Personally, I have to  
agree that I have to pursue this position to  
follow on what I would like to do, so I would  
have to say to the Court that, yes, I do.

(F.H.T. at 18-19)

Judge Camp felt that Mr. Lonchar's major motivation behind his  
litigation was to use his case as a vehicle for systemic change, to  
abolish the Electric Chair and provide inmates on Death Row with an  
option to save other lives, if in fact their executions could not  
be averted. Judge Camp explicitly did not find, however, that this  
vitiating the good faith with which the rest of the petition was to  
be litigated.

While the Warden adverts to this in passing, it should be  
emphasized that Larry Lonchar's motives in litigating all the  
issues in his case are not relevant to what the outcome will  
actually be. On the face of the petition, it would probably be  
true to say that he has more chance of winning the challenge to his  
conviction than to change the method of execution.<sup>5</sup>

<sup>5</sup> That is not to say, of course, that counsel's advice that  
pending litigation could precipitate political change would be  
false. However, clear precedent from this Court indicates that Mr.



It is true, but entirely irrelevant to the merits of the claims, that Larry Lonchar filed his 1993 state habeas petition to avoid his brother's suicide. (F.H.T. at 19) Now, one precipitant for Mr. Lonchar going along with his appeals is that he sees some chance that his litigation will help others, "all of these people's lives involved. . . ." (F.H.T. at 21) In another case, it might be that a petitioner believed that his mother would be happy at his pursuing his appeals. In another case, his motivation might be his desire to watch the N.B.A. finals for many years to come. These motives are simply not relevant to whether there is merit to the claims presented, and whether the claims may result in one type of relief (changing the method of execution) or another (vacatur of his convictions and sentences) is not relevant to the fact that such relief is being sought.

**III. PETITIONER SHOULD SURELY HAVE THE OPPORTUNITY TO ADDRESS ANY NOVEL RULE BARRING RELIEF IN THE LOWER COURT**

When the issue of abuse of the writ came up in Court yesterday, it had not been anticipated by Petitioner. After all, Rule 9(b) simply does not apply to the first petition filed in federal court by a Petitioner, as counsel had correctly advised Mr. Lonchar. It was not until counsel arrived in Court that counsel received the state's pleading raising abuse of the writ. As

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Lonchar will also, or alternatively, receive a new trial since he was not present for much of his first trial. This is a capital case and under the authority of "Diaz and Hopt . . . a capital defendant's right to presence is nonwaivable." Proffitt v. Wainwright, 685 F.2d 1227, 1258 (1982), modified on rehearing, 706 F.2d 311 (11th Cir. 1983); accord Hall v. Wainwright, 733 F.2d 766, 775 (11th Cir. 1984).

counsel said in the District Court, counsel was "not prepared to address it in depth." (F.H.T. at 24) However, counsel did claim Petitioner's right to an evidentiary hearing:

But I would request that opportunity for an evidentiary hearing as I think the one thing the Potts case makes very clear . . . if the State has come forward with its burden of production, there has to be an opportunity for an evidentiary hearing if the record doesn't make it categorically clear on the face that there is not abuse.

(F.H.T. at 24) Counsel noted that he was "going to have to think this through more carefully than I've had the chance to do. . . ."

(F.H.T. at 26)

It as hard enough to respond to Rule 9(b) in this fashion, but the Court required counsel to present such evidence as was available on the issue of abuse. With just twelve minutes to prepare, counsel noted that, "as far as the available testimony right here, I guess it's me." (F.H.T. at 43) This in fact took place, and was the extent of the evidence available on such short notice.<sup>6</sup>

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<sup>6</sup> Counsel made it clear that a proper hearing on Rule 9(b) should entail other evidence. Counsel stated that if they were available he would present "some other lawyers who have been involved in this case as to who the ones really have been who have prevented this coming to pass. . . ." (F.H.T. 27) This would show that "there would be something fundamental[ly] inequitable . . . to blame Larry Lonchar for the actions that were taken not only without his consent, but against his will [in] a next friend petition." (F.H.T. at 27) This and other evidence would show that Mr. Lonchar's "motivation hasn't been to abuse the writ to vex, harass and delay. His motivations have been very sincere." (F.H.T. at 29)

Counsel also noted that it would be important to explore the question of Larry Lonchar's mental state. (F.H.T. 43 et seq.) Counsel asked that "we be given the opportunity . . . to present other evidence, I would think including Dr. Herendeen and his experiences consulting with Larry over the last year and a half."



If it was difficult for Petitioner to respond to the novel Rule 9(b) argument in the lower court, Petitioner had no opportunity to present evidence on the amorphous notions of "equity" that the Warden seeks to advance in this Court today. There is obviously a great deal of evidence that would be relevant to this inquiry, including any prejudice to the Warden, whether the shifting sands of the Warden's positions would deprive him of the clean hands needed to assert this new rule, and so on and so forth.

The law is clear that Petitioner has the right to a reasonable time to prepare his defense against abuse, and a right to be heard on these matters. It is clear from Rule 9(b) itself that if the question of abuse is raised, "it is inherent in this obligation placed on petitioner [to respond to allegations of abuse] that he must be given an opportunity to make his explanation. . . ." *Advisory Notes to Rule 9(b)* (quoting Johnson v. Copinger, 420 F.2d 395, 399 (4th Cir. 1969)).

Indeed, since at least Vaughan v. Estelle, 671 F.2d 152 (5th Cir. 1982), it has been clear in this Circuit that "[t]he applicant is to be afforded a reasonable opportunity to traverse the suggestion of abuse." *Id.* at 153. In Vaughan the petitioner had never been given a hearing on abuse, but he had at least had time to pull

---

(F.H.T. at 47) This would include how Petitioner's illness of manic depression has played into the alleged "manipulation" of the system.

Counsel also stated that the conditions at the prison--in particular the intolerable heat in summer--has been important to Larry Lonchar's periodic desire to die. (F.H.T. at 45) This is precisely the kind of evidence countenanced in Potts v. Zant, 638 F.2d 727, 749 (11th Cir. 1981). These and other factors would also be relevant to the State's novel argument made today.

together evidence, and since he had litigated a prior § 2254 case, he was on notice that abuse of the writ would be an issue.

In this case, it is clear that Petitioner had the right to notice of the Warden's "novel" argument in time for the hearing yesterday, and has the right to know what the argument really entails before he can be required to respond to it with evidence.

Even were this a case of abuse of the writ--and Rule 9(b) simply has no application--the Potts litigation is mighty precedent for a finding that Petitioner should be allowed to proceed in this case. On June 26, 1980, Judge O'Kelley dismissed the petition, finding Potts' prior statements in the next friend petition to "provide cumulative support for a finding that the writ of habeas corpus has been abused." Potts v. Zant, Order at 8 (N.D. Ga. June 26, 1980). This Court reversed.


The Court also held that in arguing for the dismissal of fundamental constitutional claims, "the State's position would be particularly difficult where--as in the present case--a determination has not yet secured a determination on the merits of his claims." Potts v. Kemp, 764 F.2d 1369, 1371 (11th Cir. 1985). This showing was not made in Potts where the "evidence . . . did not establish that the petitioner acted with the intent to 'vex, harass and delay.'" *Id.* It is not clear quite what must be shown under the amorphous argument made by the Warden in this case. However, if Potts was allowed to proceed after dismissing his own prior federal habeas petition (and various next friend applications) and ultimately secure relief from this Court, so must Larry Lonchar.



Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Court deny the Warden's motion to lift the stay of his execution.

This 29th day of June, 1995.

  
Respectfully submitted.

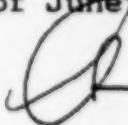
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CERTIFICATE

I hereby certify that the foregoing pleading has been served on counsel opposite this 29th day of June, 1995.

  
\_\_\_\_\_

5  
No. 95-5015

Supreme Court, U.S.  
FILED

AUG 29 1995

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1995

LARRY GRANT LONCHAR,  
v. *Petitioner,*

A. G. THOMAS, WARDEN,  
GEORGIA DIAGNOSTIC & CLASSIFICATION CENTER,  
*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI FILED JUNE 29, 1995  
WRIT OF CERTIORARI GRANTED JUNE 29, 1995

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6/27/95	1.	Memorandum in Support of a Stay of Execution, in Opposition to any Motion to Dismiss, and in Support of Motion for Evidentiary Development
6/27/95	2.	Motion for Stay of Execution
6/27/95	3.	Petition for Writ of Habeas Corpus
6/27/95	4.	Notice of Appeal
6/28/95	5.	Motion to Dismiss for Abusive Conduct, Brief in Support and Response to Motion to Stay
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6/28/95	7.	Order granting temporary Stay of execution
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6/28/95	9.	Second Memorandum in Opposition to Motion to Dismiss on Grounds of Abuse of the Writ
6/28/95	10.	Third Memorandum in Opposition to Motion to Dismiss on Ground of Abuse of the Writ
6/28/95	11.	Order: Respondent's Motion to Dismiss is denied; Petitioner's Motion for Stay of Execution is granted; Petitioner's Motion for Evidentiary Development is denied as MOOT

IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

---

Case No. 90-V-2735

CHRIS LONCHAR KELLOG,  
As Next Friend to Larry Grant Lonchar,  
*Petitioner*  
vs.

WALTER ZANT, Warden,  
Georgia Diagnostic and Classification Center,  
*Respondent*

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**ORDER**

Chris Lonchar Kellogg, sister of Larry Lonchar, has filed a petition for writ of habeas corpus as next friend. Also before the Court is a motion filed by Michael Mears, an attorney in private practice in Decatur, Georgia. Mr. Mears filed a motion to determine whether Larry Lonchar is competent to waive further legal efforts on his behalf, and a motion for stay of execution.

Larry Grant Lonchar was indicted in DeKalb County for the malice murders each of Charles Wayne Smith, Steven Smith and Margaret Sweat, and the aggravated assault of Charles Richard Smith. Following a trial by jury, Lonchar was found guilty on the three counts of murder and the one count of aggravated assault and received a sentence of death by electrocution for the three counts of murder and a sentence of twenty years imprisonment for the one count of aggravated assault. Lonchar's convictions and sentences were affirmed by the Supreme Court of Georgia on July 13, 1988. *Lonchar v. State*, 258 Ga. 447, 369 S.E.2d 749 (1988).

A motion for rehearing was filed on Lonchar's behalf, and denied by the Supreme Court of Georgia on July 29, 1988. Subsequently, a petition for a writ of certiorari in the United States Supreme Court was filed on Lonchar's behalf, and denied on January 9, 1989. Thereafter, a petition for rehearing of the denial of certiorari was denied by the United States Supreme Court on February 27, 1989. On March 8, 1990, an order of execution was entered by the Superior Court of DeKalb County scheduling an execution period running from March 23, 1990 through March 30, 1990.

Hearings concerning Lonchar's competency to waive further collateral review, and to determine Chris Lonchar Kellogg's standing to bring an action for habeas relief as next friend were held by this Court on March 21 and March 28, 1990.

**FINDINGS OF FACT**

Appendix 1 to Mrs. Kellogg's petition is the report of Dr. Robert T. M. Phillips. Dr. Phillips is currently an Assistant Clinical Professor of Psychiatry at Yale University.

After examining Larry Lonchar, Dr. Phillips was of the opinion that Lonchar had a psychiatric illness known as Bipolar Disorder (Manic Depression). Dr. Phillips was of the opinion that Lonchar might also have an underlying neurologic disorder consistent with traumatic brain damage that might be consistent with a diagnosis of Temporal Lobe Epilepsy. Dr. Phillips indicated that if he were seeing Lonchar in his private practice he would seek, among others, an electroencephalograph (EEG) and a magnetic resonance imaging (MRI) scan in order to satisfactorily rule out the presence of an organic brain disorder.

Dr. Phillips holds the opinion that Lonchar does not have the capacity to appreciate his position and to make



a rational choice with respect to continuing or abandoning further litigation, and that as a result of his mental disease he is necessarily substantially affected in his capacity to appreciate his position and to make rational choices regarding continuing or abandoning further litigation.

Among the witnesses called by the Respondent at the hearing on March 28, 1990, was Dr. Rod Bonfante, a neurologist at Central State Hospital. Dr. Bonfante testified about his opinion of an EEG performed on Lonchar on March 23, 1990 at Central State.

Dr. Bonfante testified that Lonchar's EEG was normal, that he found no evidence of epilepsy, and no signs of organic brain damage.

Dr. Robert Storms, Chief Psychologist at Central State saw Lonchar briefly while he was at Central State. While Dr. Storms did not perform a full-scale examination of Lonchar, his impression of Lonchar's condition was that he appeared to have a rational state of mind, and that he presented with no known mental disorder.

Dr. Everett C. Kuglar, a board certified psychiatrist with a speciality in forensic psychiatry, examined Lonchar. As part of his evaluation, Dr. Kuglar had neurological testing procedures performed on Lonchar. These procedures included an EEG and brain scan at Central State, and a MRI at the Medical College of Georgia. Dr. Kuglar personally interviewed Lonchar on two occasions for a total of two and one-half hours. Dr. Kuglar also reviewed Dr. Phillips' report, affidavits of Lonchar's family members, pretrial evaluations of mental health experts, psychological reports from the Michigan Department of Corrections, mental health notes while Lonchar was incarcerated in a county jail prior to his trial, along with other information provided to him.

As a result of this information together with a reading of the EEG, brain scan, and MRI reports, Dr.

Kuglar was of the opinion that Lonchar has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation. Dr. Kuglar was also of the opinion that Lonchar was not suffering from any mental disease or defect. Dr. Kuglar was of the opinion that Lonchar did have a mental disorder diagnosed as Dysthymia or Depressive Neurosis along with a concomitant Personality Disorder; however, Dr. Kuglar did not believe that these disorders affected his capacity in the premises.

Dr. Kuglar found no medical evidence in the neurological reports of either epilepsy or brain injury. Dr. Kuglar's opinion was that Lonchar is mentally competent to waive any further collateral review.

Finally, Dr. Kuglar found no evidence that Lonchar was mentally incompetent to be executed as defined under *OCGA*, Section 17-10-60 *et seq.*

### CONCLUSIONS OF LAW

It does not appear that the appellate courts of this State have had an opportunity to address the issues before this Court.

The Supreme Court of the United States has announced a standard to be used in deciding whether a person is mentally competent to choose to forego further appeals and collateral review of his conviction and sentence. *Rees v. Peyton*, 384 U.S. 312, 86 S.Ct. 1505, 16 L.Ed.2d 583 (1966). That test is:

Whether the prisoner has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder or defect which may substantially affect his capacity in the premises.

*Rees v. Peyton*, 16 L.Ed.2d 583 at 584-585.

This test has been used by several circuits when deciding competency issues before them. *Wilson v. Lane*, 870

1250 (7th Cir. 1989); *Smith v. Armontrout*, 812 F.2d 1050 (8th Cir. 1987); *Rumbaugh v. Procunier*, 753 F.2d 395 (5th Cir. 1985).

While the experts for each side in the instant case differ in their opinion of the prisoner's competence, that was true in the three circuit cases cited above. *Rumbaugh v. Procunier*, 753 F.2d 395 at 399-400 (7th Cir. 1985); *Smith v. Armontrout*, 812 F.2d 1050, at 1054-1055 (8th Cir. 1987); *Wilson v. Lane*, 870 F.2d 1250, at 1252 (7th Cir. 1989).

Certainly, prisoners exhibiting much more bizarre behavior than Lonchar have been found competent under the *Rees* standard. See *Rumbaugh v. Procunier*, 753 F.2d 395, at 397.

Weighing the evidence produced, and taking into account the Courts' observations of Lonchar and responses of Lonchar to questions posed by the Court, the Court finds that the evidence clearly shows Lonchar to be competent to waive further collateral review under the *Rees* standard. Collaterally, the Court also finds that Lonchar is not mentally incompetent to be executed as defined under *OCGA*, Section 17-10-60.

Having found Mr. Lonchar competent, the Court finds that Chris Lonchar Kellogg lacks standing to bring a petition for writ of habeas corpus as next friend.

Accordingly, the petition is hereby dismissed and the motion for stay of execution is denied.

SO ORDERED, this 29th day of March, 1990.

/s/ Hal Craig  
HAL CRAIG  
Judge, Superior Courts  
Flint Judicial Circuit

[Filed Apr. 22, 1991]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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Civil Action File No. 1:90-CV-2336-JTC

CHRIS LONCHAR KELLOG,  
As Next Friend for Larry Lonchar,  
*Petitioner,*

v.

WALTER ZANT, Warden,  
Georgia Diagnostic and Classification Center,  
*Respondent.*

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ORDER

For purposes of information and to protect the record, the court notes the following:

Petitioner's application for writ of habeas corpus was filed in this court on October 23, 1990. At the time the petition was filed, the state habeas corpus action was still pending on a motion for rehearing in the United States Supreme Court. The motion for rehearing concerned the denial of the writ of certiorari from the Georgia Supreme Court's decision affirming the decision of the Superior Court of Butts County. The Superior Court of Butts County found petitioner competent to waive review of his conviction and sentence. Thus, that court denied standing to petitioner's next of friend to bring the state habeas petition. The Supreme Court denied the motion for rehearing on December 3, 1990.

This court lacks jurisdiction in this matter until the state court habeas corpus action is final. As such, even though this petition was filed in this court in October of



1990, the court is unable to take this matter under advisement. In order to promptly consider this matter at the earliest moment, the parties are DIRECTED to advise the court when jurisdiction over the matter properly rests with it.

SO ORDERED, this 18 day of April, 1991.

/s/ Jack T. Camp  
 JACK T. CAMP  
 United States District Judge

[Filed Aug. 15, 1991]

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF GEORGIA  
 ATLANTA DIVISION

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 [Title Omitted in Printing]  
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**ORDER**

This action is presently before the court on respondent's motion to dismiss petitioner's application for writ of habeas corpus. Respondent's motion to dismiss is DEFERRED.

**I. FACTS**

The facts, as set forth in this court's June 7, 1991 order, are as follows:

Larry Lonchar was convicted of malice murder in the Superior Court of DeKalb County, Georgia on June 25, 1987 and was sentenced to death by electrocution. Mr. Lonchar failed to attend his own trial, and made no effort to appeal his conviction or his sentence, either on direct appeal or through collateral review. However, the case was heard upon automatic appeal to the Georgia Supreme Court.

The Supreme Court of Georgia affirmed the conviction and sentence. *Lonchar v. State*, 258 Ga. 447, 369 S.E. 2d 749 (1988). A petition for writ of certiorari was denied by the Supreme Court of the United States on January 9, 1989. *Lonchar v. Georgia*, 488 U.S. 1019 (1989). A petition for rehearing was denied on February 27, 1989. *Lonchar v. Georgia*, 489 U.S. 1061 (1989).

Petitioner's execution date was then set to fall between the dates of March 23, 1990 and March 30, 1990, after petitioner so requested. On March 20, 1990, the Georgia Supreme Court refused to stay the execution, on grounds that the motion was premature.

On March 21, 1990, the petitioner, through his next friend, filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia. Because petitioner's next friend's standing to file the habeas claims is premised on petitioner's incompetence, the state ordered that petitioner be evaluated by a state psychiatrist. A hearing on petitioner's competency was conducted on March 28, 1990. On March 29, 1990, the Superior Court found Mr. Lonchar to be competent. Prior to this determination of competency, no judicial determinations of competency were made in this case, before, during or after the trial.

On May 2, 1990, petitioner's application for certificate of probable cause was denied. *Kellogg v. Zant*, 260 Ga. 182, 390 S.E.2d 839 (1990). The petition for rehearing was denied on May 23, 1990. A petition for writ of certiorari in the United States Supreme Court was denied on October 9, 1990. Finally, a petition for rehearing in the United States Supreme Court was denied on December 3, 1990. On April 18, 1991 this court entered an order directing the parties to notify the court when jurisdiction returned to this court as a result of the conclusion of the state proceedings and the appeals therefrom. On June 7, 1991, this court entered an order requesting the state's response to two specific issues raised with regard to the state competency hearing and the standing of petitioner.

Mr. Lonchar's next friend, his sister, alleges that he is incompetent to waive his appeal and other postconviction relief. Further, petitioner alleges that the competency hearing conducted in the state court was inadequate.

## II. DISCUSSION

Petitioner's application for writ of habeas corpus raises the primary preliminary question of who has standing to bring this action. A person lacks standing to bring a habeas corpus proceeding for another unless the "next friend" adequately explains why the real-party-in-interest cannot appear on his own behalf, as well as showing a sufficient relationship and interest with that person. *Weber v. Garza*, 570 F.2d 511, 513-14 (5th Cir. 1978).<sup>1</sup> This petition is brought on Mr. Lonchar's behalf by his sister. A sibling will qualify as next friend, provided the cause element is met. *See Smith v. Armontrout*, 812 F.2d 1050 (8th Cir. 1987), *cert. denied*, 483 U.S. 1033.

A next friend is the proper party to bring an action if it is demonstrated that the real-party-in-interest cannot seek relief on his own behalf. *Gilmore v. Utah*, 429 U.S. 1012, 1014, *reh'g denied*, 429 U.S. 1030 (1976). The next friend petition, thus, is proper if it is shown that the real-party-in-interest is incompetent to waive his rights. *Gilmore*, 429 U.S. at 1015. In fact, the inability of the real-party-in-interest to litigate his own cause due to mental incompetency is a "necessary condition" to "next friend" status. *Whitmore v. Arkansas*, 110 S.Ct. 1717 (1990). Thus, if Mr. Lonchar is competent to waive his rights to seek relief in the courts, this court lacks jurisdiction to hear the next friend application filed by petitioner's sister. *Gilmore*, 429 U.S. at 1017. On the other hand, if Mr. Lonchar is incompetent, the court may properly consider the merits of his next friend's petition. Consequently, in order to determine whether the court may exercise jurisdiction over the habeas corpus petition, the court must initially decide whether Mr. Lonchar is competent to waive his rights to review.

<sup>1</sup> In *Bonner v. Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions rendered by the former Fifth Circuit prior to October 1, 1981.



The Superior Court of Butts County found Mr. Lonchar competent following a hearing into the matter. Thus, the first consideration to be made by this court in that regard is whether the competency hearing held by the Superior Court is entitled to the presumption of correctness. If so, this court is precluded from further consideration of the competency of Mr. Lonchar, and the state court's determination will stand. For the presumption of correctness to stand with regard to determinations of competency, the court must have applied the correct legal standard for determining competency, and that conclusion must be supported by substantial evidence developed at a full and fair hearing. *Bundy v. Dugger*, No. 86-3773, 1987 U.S. App. LEXIS 17799 (11th Cir. 1987); *Price v. Wainwright*, 759 F.2d 1549, 1551-52 (11th Cir. 1985).

The presumption of correctness is applicable only after a state court of competent jurisdiction makes "a determination after a hearing on the merits of a factual issue," which is "evidenced by a written finding, written opinion, or other reliable and adequate written indicia." 28 U.S.C. § 2254(d). The record in this instance indicates that the state court judge who conducted the competency hearing made written findings of fact. Accordingly, the presumption of correctness should apply unless petitioner proves some exception to the presumption.

The court must examine the question of whether the petitioner establishes one of the Section 2254 exceptions. If all of the prerequisites to the presumption of correctness are met, the findings are presumed correct, unless the applicant can establish otherwise. *Bundy v. Wainwright*, 808 F.2d 1410, 1416 (11th Cir. 1987). An applicant can establish otherwise by showing an exception to the rule.

Several exceptions to the presumption of correctness exist. The petitioner can establish an exception to application of the presumption by showing that the merits of the dispute were not resolved by the state court; that the

factfinding procedures employed by the state were inadequate to afford the petitioner a full and fair hearing; that material facts were not developed at the state hearing; that the applicant failed to receive a full and fair hearing in the state proceeding; that the applicant was denied due process of law; or that the factual determination is not fairly supported by the record. 28 U.S.C. 2254(d)(1), (2), (3), (6), (7), and (8); *Bundy*, 808 F.2d at 1416. Petitioner alleges that the presumption of correctness is inapplicable to the Butts County court's determination of Mr. Lonchar's competency in light of the six Section 2254 factors enumerated above.

First, the court will consider the adequacy of the state competency hearing. Petitioner claims that the state hearing into Mr. Lonchar's competency was inadequate for several reasons. First, petitioner asserts that she lacked any funds to investigate or depose witnesses. Second, she complains that no discovery was allowed. Third, the defense asserts that it was not given notice of any but one state witness. Fourth, the petitioner argues that she was not given adequate notice of the hearing in which to enforce subpoenas. Fifth, petitioner contends that state's expert psychiatric witnesses were instructed not to speak with defense counsel prior to trial. Defense further contends that the state court hearing excluded opinions by petitioner's experts, denied petitioner the opportunity for rebuttal and compromised the opportunity for effective cross examination. Finally, petitioner argues that the state court expert, Dr. Kuglar, who opined that petitioner was competent, applied the wrong standard when he stated that he could not say that petitioner's mental illness was compelling or overwhelming him to "waive his appeals."

The court rejects petitioner's contentions that the state witnesses were instructed not to confer with defense counsel prior to trial, that petitioner was denied funds when she failed to request funds, or that the state court expert Dr. Kuglar applied the wrong standard. However, the

court is concerned that the setting in which this hearing took place may have compromised the adequacy of the competency hearing.

In order for a state court proceeding to afford a full and fair hearing, certain standards must be met. In a capital proceeding, the court should ensure that the fact-finding procedures "aspire to a heightened standard of reliability." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). First, the procedures should allow the petitioner the opportunity to present relevant material on his behalf. *Id.* at 413. Second, the court should allow the defense attorneys the occasion to challenge and impeach the state psychiatrists. *Id.* at 415. "[A]ny procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate." *Id.* at 414. The "adversarial presentation of information [must] be as unrestricted as possible." *Id.* at 417.

In *Martin v. Dugger*, 686 F. Supp. 1523 (S.D. Fl. 1988), *aff'd* 891 F.2d 807 (11th Cir. 1989), the court found that the competency hearing was unfair where the hearing judge failed to comply with traditional requirements governing notice and where the hearing's mechanics did not conform to the essential standards that form the basis of the country's adversarial system. *Id.* at 1562. In order for notice to be adequate, the court held, it must be sufficient to provide the petitioner with a *meaningful* opportunity to be heard. *Id.* In that case, the judge found that no meaningful opportunity to be heard was provided.

First, because the deadline for petitioner's execution was looming close on the horizon, the court refused to stay the hearing. *Id.* at 1563. Because most of the state's witnesses who could rebut the state psychiatrist's findings that petitioner was competent to be executed were out of state and could not be brought in to testify due to inadequate notice, the refusal of the hearing court

to stay the proceeding in order to allow petitioner the opportunity to present evidence on his own behalf made the hearing inadequate under Section 2254. *Id.* *Martin* is very similar to the case at hand because there, as here, the judge refused to delay the hearing working under the theory that the impending execution made time of the essence; even though both judges allowed both parties to present testimony, the hearing lacked in fundamental fairness because of the time constraint and its effect on the mechanics of the proceeding. *See id.* at 1563-64.

On March 21, 1990, petitioner's attorneys first learned that a competency hearing would take place at some unspecified future date. However, the court did not schedule the actual date of the hearing until approximately twenty-four hours, or less, in advance of its commencement. Because of the expediency required to determine the issue of Mr. Lonchar's competency before his scheduled execution, which was to occur no later than the second day after the hearing, the competency court seemingly endangered the fullness and fairness of the competency hearing. *See Demosthenes v. Baal*, 110 S.Ct. 2223, 2228 (1990) (Brennan, J., dissenting) (a competency hearing in a capital case, which is hurried to accommodate an impending execution date, may preclude a "full and fair" hearing). The inadequate notice of the hearing impaired petitioner's capacity to present witnesses and to rebut the state's evidence.

Petitioner's attorneys were not notified as to the state's evidence until just hours before the hearing. The state attorney's are not to be faulted for this, however, as they too did not receive the medical reports until just hours before the hearing. However, the delayed announcement of the actual hearing date and the truncated notice of the state's evidence effectively denied petitioner the opportunity to present evidence and rebut the state's evidence, which made the hearing inadequate.

An example of the inability of the petitioner to realistically present evidence on behalf of Mr. Lonchar follows.



Petitioner made numerous requests to delay the hearing for just one day because of inadequate notice which prejudiced her ability to defend and present her position. All such requests were denied. Specifically, on one occasion, petitioner's attorneys attempted to introduce an expert opinion to rebut the opinion of Dr. Kuglar concerning the MRI. Dr. Kuglar relied on the interpretation of another analyst in reaching his conclusions concerning the MRI since he had never seen one before. He opined that the MRI reflected no abnormalities. The petitioner was unable to secure an expert opinion in time to present live testimony at trial to rebut the MRI since he was not given the test results just hours prior to the hearing. Petitioner's out-of-state consultant, who received the test copies by overnight mail, sent back his opinion by fax the next day, which was the day of the hearing, to the courthouse. The court refused to admit the evidence since it was in an improper form, that being the form of a letter, as opposed to an affidavit.

While it is proper for the court to exclude evidence which appears in improper form, the court is concerned that the exclusion of such evidence in this case had the effect of precluding petitioner's evidence on Mr. Lonchar's incompetence. Furthermore, if adequate time were afforded the defense to prepare their position—even a couple of more days—surely the doctor's opinion would have been presented in admissible form. By excluding relevant evidence under these circumstances, the Superior Court created a hearing lacking in procedures designed to ensure a full and fair hearing on the competency issue. The decision on competency is much more likely to be erroneous where the petitioner is prohibited from presenting facts regarding the subject's competency. *Ford*, 477 U.S. at 414.

Other examples of how the abbreviated notice of the hearing handicapped petitioner's ability to present her case exist. For example, although petitioner's attorneys

knew a hearing would be upcoming, it is impossible to issue subpoenas for witnesses' testimony without having a date and time for them to appear. O.C.G.A. § 24-10-24 (a) states that every subpoena shall state the time and place that the person is to appear. In this instance, the defense attorneys did not know of the date and time of the competency hearing until at the most twenty-four hours in advance. As a practical matter, twenty-four hours notice allows the attorneys little time to obtain and serve subpoenas on witnesses.

Furthermore, petitioner's ability to present her position in light of the nature of the hearing may have suffered additional damage as a result of the lack of notice and petitioner's ensuing inability to subpoena witnesses. Decisions involving competency present special considerations. First, psychiatrists often substantially disagree as to what constitutes mental illness, as to diagnosis and treatment. *Ake v. Oklahoma*, 470 U.S. 68 (1985). Thus, the factfinder is forced to reach a conclusion based on the evidence offered by each party. *Ford*, 477 U.S. at 414. It is doubtful whether the factfinder can fairly make credibility determinations solely on the basis of a paper record. *Agee v. White*, 809 F.2d 1487, 1494 n.3 (11th Cir. 1987). See *Hyman v. Aiken*, 824 F.2d 1405, 1411-12 (4th Cir. 1987) (presumption of correctness not applicable to credibility findings based on cold record). Where, as here, one side is effectively precluded from presenting live expert testimony in support of its position, the reliability of the competency determination, as well as the fairness of the hearing is undermined.

Finally, the competency court quashed petitioner's subpoena for Mr. Lonchar's administrative prison files on the basis that adequate time existed prior to the hearing for the defense attorneys to utilize established procedures to declassify the confidential information regarding Mr. Lonchar. In order to declassify the information, *the inmate* must request the declassification by written re-

quest to the Commissioner of the Department of Correction. In this case, Mr. Lonchar was not assisting petitioner in bringing this application, as he is opposed to any review of his competency and wishes the court to proceed with his execution. Thus, this court finds it unlikely that Mr. Lonchar would have agreed to declassify this information for the purposes so stated. Second, if Mr. Lonchar did agree to this procedure, it is unlikely that with just seven days existing between the first hearing and the competency hearing, that a written request from prison could be mailed, received, processed and returned in time for counsel to adequately review the administrative prison records for the competency hearing. However, information contained in this file may have been pertinent evidence as it contained information on Mr. Lonchar's behavior in prison. Further, it served, at least in part, as a basis for one of the state's experts who opined that Mr. Lonchar was competent.

In the rush to execute Mr. Lonchar, the state court compromised the adequacy of the competency hearing.<sup>2</sup> Thus, the court finds that the state procedures were inadequate to afford the petitioner a full and fair hearing into Mr. Lonchar's competency. As such, the presumption of correctness is inapplicable.

Accordingly, the court must reconsider the issue of Mr. Lonchar's competency in order to determine whether Mr. Lonchar's next friend has standing before this court to present the application for writ of habeas corpus on the his behalf. As such, an evidentiary hearing into Mr. Lonchar's competency is **HEREBY ORDERED**.

The court will allow limited discovery prior to the competency hearing. The scope of the discovery will be determined at a discovery conference to be held at 3:30 p.m. on Thursday, August 29, 1991. The competency

<sup>2</sup> An unfortunate collateral consequence of the State's unwillingness to delay the original execution date by a few days is a substantial increase in the length of these proceedings.

hearing is specially set to begin at 10:00 a.m. on Tuesday, October 15 and continuing through Wednesday, October 16, 1991. Respondent's motion to dismiss is **DEFERRED** pending the competency hearing.

**SO ORDERED**, this 13th day of Aug. 1991.

/s/ Jack T. Camp  
JACK T. CAMP  
United States District Judge



[Filed Feb. 18, 1992]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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[Title Omitted in Printing]

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**ORDER**

**I. STATEMENT OF THE CASE**

Larry Grant Lonchar was convicted on June 25, 1987, in the Superior Court of DeKalb County, Georgia, for three counts of malice murder and one count of aggravated assault. Lonchar was sentenced to death for the malice murder convictions and to twenty-years imprisonment for the conviction of aggravated assault. The Supreme Court of Georgia affirmed both the convictions and the sentences on July 12, 1988, and denied a Motion for Rehearing on July 29, 1988. *Lonchar v. State*, 258 Ga. 447, 369 S.E.2d 749 (1988). The Supreme Court of the United States denied a petition for a writ of certiorari on January 9, 1989. *Lonchar v. Georgia*, 488 U.S. 1019 (1989). A petition for rehearing was denied on February 27, 1989. *Lonchar v. Georgia*, 489 U.S. 1061 (1989).

Mr. Lonchar's execution date was then set to fall between the dates of March 23, 1990, and March 30, 1990, at his request. On March 20, 1990, the Georgia Supreme Court refused to stay the execution, on grounds that the motion was premature.

On March 21, 1990, Chris Lonchar Kellogg filed a Petition for a Writ of Habeas Corpus as next friend for

Mr. Lonchar. Ms. Kellogg sought to have the court declare Mr. Lonchar incompetent in order that the next friend petition might proceed. Mr. Lonchar emphatically stated that he opposed any petition being filed and specifically stated that he did not have counsel representing him at the hearing. Because Ms. Kellogg's standing as next friend to file the petition is premised on finding Mr. Lonchar incompetent, the Superior Court of Butts County ordered an evaluation of Mr. Lonchar, and set a hearing on his competency for March 28, 1990. An evidentiary hearing was conducted, and the Superior Court found Mr. Lonchar competent on March 29, 1990. The Georgia Supreme Court then stayed the execution in order to review the competency determination.

On May 2, 1990, the Supreme Court of Georgia denied Petitioner's application for certificate of probable cause. *Kellogg v. Zant*, 260 Ga. 182, 390 S.E.2d 839 (1990). The Petition for Rehearing was denied on May 23, 1990. A Petition for Writ of Certiorari to the United States Supreme Court was denied on October 9, 1990, and a Petition for Rehearing in the United States Supreme Court was denied on December 3, 1990.

Ms. Kellogg had filed an Application for Writ of Habeas Corpus in this Court on October 23, 1990; however, this Court had no jurisdiction because of the pending state court proceedings. Nothing further occurred in this Court until this Court entered an Order on April 18, 1991, directing the parties to notify this Court when its jurisdiction was perfected as a result of the conclusion of the state proceedings.

On June 7, 1991, this Court entered an Order requesting the State's response to two specific issues raised by Petitioner: first, whether the competency hearing conducted in the State court was inadequate; and second, whether Mr. Lonchar is incompetent to waive his appeals and other post-conviction relief.

This Court entered an Order on August 15, 1991, declining to apply the presumption of correctness to the state court competency determination. The Court expressed concern about the fairness of the competency hearing in view of the impending execution date. Also, the short notice of the hearing impaired the Petitioner's capacity to present evidence and to rebut the State's evidence. As a result, this Court ordered an evidentiary hearing into Mr. Lonchar's competency to begin on October 15, 1991. At the request of the parties, the hearing was subsequently continued to November 12, 1991. The Court entered an Order appointing Mr. Michael D. Mears, as attorney for Petitioner Kellogg, authorizing certain expenditures, and permitting discovery by the parties in order to prepare for the hearing.

The purpose of the hearing was to determine the issue of Ms. Kellogg's standing to bring a petition as next friend for Mr. Lonchar. Ms. Kellogg's standing depends upon whether Mr. Lonchar is incompetent or otherwise unable to bring a petition on his own behalf. As a result of the evidentiary hearing, this Court makes the following Findings of Fact and Conclusions of Law.

## II. FINDINGS OF FACT

1. Christini Lonchar Kellogg brings the application before the Court as next friend for Larry Lonchar.

2. Petitioner is Mr. Lonchar's sister.

3. Mr. Lonchar is opposed to any further appeals or other relief seeking to challenge his conviction or sentence. He did not authorize the present application for habeas corpus and is opposed to this Court's considering the application.

4. Mr. Lonchar understands his position clearly: that he stands convicted of murder and is sentenced to death.

5. Mr. Lonchar understands his options clearly: that federal habeas corpus is the last opportunity for him to

obtain review of his sentence; that there are substantial arguments that his sentence should be overturned; and that failure to pursue this option will result in his execution.

6. The record in this case presents no significant evidence of any psychotic episode or of any substantial distortion of Mr. Lonchar's perception of reality.

7. The record in this case presents no significant evidence that Mr. Lonchar suffers from neurological defect.

8. Mr. Lonchar does not suffer from a mental disease or defect. Mr. Lonchar is not suffering from bipolar disorder. No significant evidence in the extensive record in this case supports the diagnosis of bipolar disorder or other mental disease.

9. Mr. Lonchar suffers from a mental disorder. He has suffered chronic mild to moderate depression for a number of years which has been correctly diagnosed as dysthymia. Mr. Lonchar also suffers from a personality disorder, which includes anti-social and self-defeating traits.

10. Lonchar's depression, with its feelings of hopelessness and lack of self-worth, affects his decision making; however, he possesses the ability to rationally and logically decide whether to forego further appeals.

Lonchar has given a number of reasons for his desire to forego further review of his sentence. When questioned by the Court, he simply stated he had many reasons and declined to elaborate further. During his examinations by mental health professionals, he has given several different but related reasons. He has indicated that his sentence is appropriate; that he does not wish to spend the rest of his life in prison, which he considered the most optimistic outcome of his appeal; that his life has not been meaningful since he was a boy; that he has continually been destructive to others and that he would not want to continue such a life, even if released.



In summary, Mr. Lonchar has come to the conclusion that his life is not worth living and consciously decided some time ago to make no effort to impede the process which will result in his execution.

11. Although Lonchar's decision to forego further appeals is not one with which most members of society can agree, it is a rational decision and not the result of a mental disease, defect, or disorder.

### III. CONCLUSIONS OF LAW

1. The sole issue before this Court is whether Petitioner has standing to bring a next-friend petition on behalf of Larry Grant Lonchar. *Whitmore*, *Id.* at —; 110 S.Ct. at 1728.

2. Petitioner possesses sufficient identity of interest to act as next friend for Mr. Lonchar, if he is incompetent or otherwise unable to bring a petition upon his own behalf. *Whitmore v. Arkansas*, 495 U.S. 149, 110 S. Ct. 1717 (1990).

3. Petitioner has standing only if she can convince the Court by a preponderance of the evidence that Mr. Lonchar is incompetent. *Evans v. Bennett*, 440 U.S. 1301, 1304, 99 S.Ct. 1481 (1979).

4. The standard for determining whether Mr. Lonchar is competent is that articulated in the opinion of *Rees v. Peyton*:

Whether [Mr. Lonchar] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from mental disease, disorder, or defect which may substantially affect his capacity in the premises.

*Rees v. Peyton*, 384 U.S. 312, 314, 86 S.Ct. 1505, 1506-07.

5. Applying this standard, the Court concludes that Mr. Lonchar is competent and that Petitioner lacks standing.

6. Mr. Lonchar has made a knowing and intelligent waiver of his federal rights to all post-conviction remedies. *Demosthenes v. Baal*, 495 U.S. 731, 110 S.Ct. 2223, 2225 (1990); *Gilmore v. Utah*, 429 U.S. 1012, 1015, 97 S.Ct. 436, 438 (1976).

7. Respondent's Motion to Dismiss is due to be granted.

### IV. DISCUSSION

The question presented in this case is a difficult and troubling one: whether an individual has the ability to waive further review of his sentence and thereby tacitly agree to his own execution. The question is rendered more difficult by the interest which both state and federal courts have in assuring that the ultimate sanction, the death penalty, is imposed strictly in accordance with constitutional requirements.

The Supreme Court, however, has recently narrowed the inquiry sharply in the situation presented by the present case. *Whitmore v. Arkansas*, 110 S. Ct. 1717 (1990). The *Whitmore* opinion mandates a specific task for this Court: does Petitioner have standing to seek collateral review of Mr. Lonchar's conviction and sentence in federal court? In order to have standing, Petitioner must carry her burden of convincing this Court that Mr. Lonchar is incompetent. *Id.* at 1728. The standard for competence is that articulated in *Rees v. Peyton*, 384 U.S. at 314.

In the present case, the Court is assisted in its task by a complete record of examinations of Mr. Lonchar. To the extent that it is possible to discern the workings of the human mind, the present record provides information to make such a determination. Since his arrest in 1986,

Mr. Lonchar has been examined by four psychiatrists, undergone pre-trial neuropsychological testing by a psychologist, undergone an EEG, a radio isotope brain scan, and an MRI. The record also contains observations by mental health professionals of Mr. Lonchar during his incarceration.

In addition to the information provided by these examinations, the record contains observations and examinations of Mr. Lonchar during his extensive involvement with the Michigan Department of Corrections. The Court also reviewed transcripts of Lonchar's interchanges with the Honorable Robert J. Castellani of the Superior Court of DeKalb County, who presided at Lonchar's trial, and with the Honorable Hal Craig, Superior Court of Butts County, who conducted the evidentiary hearing on his competence. In addition, this Court had the opportunity to observe Mr. Lonchar during the three days of the hearing in the present proceeding.

The three reports which carry the most weight in the Court's determination are those by the three psychiatrists who have examined Mr. Lonchar since the imposition of the death penalty. All three were highly qualified and impressive as live witnesses during the hearing held in this matter.

The first to testify was Robert T. M. Phillips, M.D., who examined Lonchar at the request of the Petitioner during March, 1990. Dr. Phillips personally examined Mr. Lonchar, reviewed the extensive records accumulated in this case, and interviewed family members. Dr. Phillips reached the opinion that Mr. Lonchar has a long-standing psychiatric illness evidenced by a psychotic thought disorder. He diagnosed the condition as bipolar disorder and concluded that Lonchar is not competent to waive further sentence review.

Two psychiatrists testified for Respondent. Everett C. Kuglar, M.D., Medical Director of the Forensic Unit at the State of Georgia's Central State Hospital, examined

Lonchar during March of 1990. The other, Dave M. Davis, M.D., a private practitioner who is board certified in forensic psychiatry, examined Lonchar in October, 1991. Both Drs. Kuglar and Davis independently arrived at strikingly similar diagnoses. Both opined that Mr. Lonchar suffers from chronic mild depression or dysthymia and a personality disorder with anti-social and self-defeating traits. After examining the tests run upon Mr. Lonchar, neither found any evidence of neurological disorder. Neither found any evidence of any psychotic disorder, bipolar disorder, or of major depression. Both concluded that Mr. Lonchar's decision to waive further appeals is rational and not the result of any disease, defect, or disorder.

Admittedly, all three psychiatrists are well qualified. After carefully weighing the testimony of each and comparing it with independent evidence in the record, this Court finds Drs. Davis and Kuglar more persuasive. First, after reviewing the entire record, the Court finds no evidence of manic attacks, major depression, or psychotic disorder. Dr. Phillips' diagnosis is premised upon Mr. Lonchar's having had previous manic attacks and having the symptoms of major depression. Without such evidence, Dr. Phillips' diagnosis must fail.

Secondly, Dr. Phillips changed several aspects of his opinion between writing his report and his testimony at the hearing in this matter. For example, he originally opined that the evidence indicated underlying neurologic disorder. TR-62. He discounted this at the hearing based upon further tests. Also, he originally opined that Mr. Lonchar was incompetent to stand trial, but qualified this significantly during his testimony. TR-86. The changes indicated some erosion of his original opinion accounting for Mr. Lonchar's behavior.

Third, once Dr. Phillips' diagnosis with regard to bipolar disorder is rejected, his opinion with regard to Mr. Lonchar's competence is based upon a finding that



moderate depression, in conjunction with personality disorders stemming from childhood, prevent Mr. Lonchar from exercising rational choice. Dr. Kuglar characterized this as a philosophical-legal-psychiatric debate upon whether people with personality disorders can exercise free choice. Dr. Kuglar opined that a person with a personality disorder has the ability to make choices with regard to their behavior. TR-355-6. The Court agrees with Dr. Kuglar. A court of law in making practical decisions related to criminal responsibility must decide on a less theoretical level.

Finally, the areas of agreement between the reports are significant. For example, all doctors found Mr. Lonchar able to discuss logically and without delusion his situation and his choices. As Dr. Phillips testified, "the content of his thought, that is, what he thought and the way in which he thought about it was certainly without overt delusion." TR-50. All found Mr. Lonchar firm and unwavering in his decision. All found him depressed and suffering from certain personality disorders. The fundamental disagreement is the extent of Mr. Lonchar's depression, and its effect upon decision making. Dr. Phillips' diagnosis of a severe or manic depression, however, depends upon evidence of prior manic episodes and symptoms of major depression, which this Court has found as a matter of fact to not exist.

Thus, the Court concludes that Mr. Lonchar does suffer from a mental disorder: chronic depression. The depression and the feelings of hopelessness attendant to it, however, are within the normal range for someone in Mr. Lonchar's situation.

Other inmates in Mr. Lonchar's position have been found competent to waive further appeals. One such case is that of Charles Rumbaugh. *Rumbaugh v. Procunier*, 753 F.2d 395 (5th Cir.) cert. denied, 473 U.S. 919 (1985). Rumbaugh was diagnosed as severely depressed

and as suffering from auditory hallucinations. He attempted suicide on numerous occasions and repeatedly mutilated himself severely. At his competency hearing, Rumbaugh drew a homemade knife and advanced on the Deputy United States Marshall shouting "shoot" in an apparent attempt to cause his own death. As a result, he was shot in the chest but recovered.

Another example is Eugene Smith, who was also found competent to waive further sentence review. *Smith v. Armontrout*, 812 F.2d 1050 (8th Cir.), cert. denied, 483 U.S. 1033 (1987). Again, Smith was found to be depressed, suffering from very low self-esteem, and an anti-social personality disorder. His depression overtly manifested itself in self-mutilating behavior and actual suicide attempts. In addition, Smith had repeatedly changed his mind about pursuing appeals. For example, while the case was upon review by the United States Court of Appeals for the Eighth Circuit, Smith wrote the court stating that he decided to prosecute his habeas petition. He attributed his earlier opposition to habeas proceedings to the conditions of his confinement.

Both Rumbaugh and Smith were found competent to waive further appeals. In contrast, Mr. Lonchar has no history of psychotic episodes, self-mutilation, or suicide attempts. He has been firm and unwavering in his decision since the denial of his petition for certiorari to the United States Supreme Court. Mr. Lonchar's depression falls short of the sort of depression manifested by Rumbaugh and Smith.

It is often the difficult task of courts to attempt to draw a line on a continuum of human behavior. No doubt chronic depression can be severe enough to deprive one of his ability to rationally choose between alternatives. However, if the opinions of the Eighth and Fifth Circuit Court of Appeals are to furnish any guidance, Mr. Lonchar's depression falls short of that line.

The lesson of previous opinions in this area is that it is possible for one sentenced to death and who resides death row to competently choose to waive further appeals. See e.g., *Gilmore v. Utah*, 429 U.S. 1012 (1976). Given that premise, Mr. Lonchar's depression appears to be within the normal range of depression for someone in this situation. As a result, respect for human dignity and the free will of the individual require deference to Mr. Lonchar's decision.

In summary, the *Rees* standard, as articulated in the *Rumbaugh* opinion, requires this Court to answer the following questions:

(1) Is Mr. Lonchar suffering from mental disease, defect, or disorder? This Court has concluded that he suffers from a mental disorder: mild to moderate depression.

(2) If Mr. Lonchar is suffering from a mental disease, defect, or disorder, does that prevent him from understanding his legal position and the options available to him? Mr. Lonchar understands both his legal position and the options available to him.

(3) If Mr. Lonchar is suffering from a mental disorder which does not prevent him from understanding his legal position and the options available to him, does that disorder, nevertheless, prevent him from making a rational choice among his options? Based upon the evidence available to this Court, the Court concludes that Mr. Lonchar is able to rationally choose among his options.

As a result of the foregoing, Petitioner has no standing to bring this action. Respondent's Motion to Dismiss is hereby GRANTED.

SO ORDERED, this 13 day of Feb. 1992.

/s/ Jack T. Camp  
JACK T. CAMP  
United States District Judge

[Filed Feb. 18, 1992]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

\_\_\_\_\_  
[Title Omitted in Printing]

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**JUDGMENT**

This action having come before the court, Honorable Jack T. Camp, United States District Judge, on defendant's motion to dismiss, and the court having granted defendant's motion, it is

Ordered and Adjudged that the petition for writ of habeas corpus be, and the same hereby is, dismissed.

Dated at Atlanta, Georgia, this 18th day of February, 1992.

LUTHER D. THOMAS  
Clerk

By: /s/ [Illegible]  
Deputy Clerk



IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

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Civil Action No. 93-V-99

HABEAS CORPUS

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LARRY GRANT LONCHAR,  
*Petitioner,*

v.

WALTER ZANT, Warden,  
Georgia Diagnostic and Classification Center,  
*Respondent.*

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**ORDER**

Upon Petitioner's request, and finding that good cause has been shown, the pre-trial hearing originally scheduled in this matter for Friday, October 29, 1993 at 10 a.m., is hereby CONTINUED until further notice of this Court.

So ORDERED, this 4th day of November 1993.

/s/ Kristina Cook Connelly  
JUDGE KRISTINA COOK CONNELLY  
Superior Court of Butts County  
(sitting by designation)

IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

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[Title Omitted in Printing]

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**ORDER ON MOTION TO RECONSIDER AND  
MOTION FOR LEAVE TO FILE EX PARTE PROFFER**

This Court having received the above motions from Mr. Bayliss and Mr. Stafford-Smith, and this Court having previously granted Petitioner's request that his counsel be dismissed and that his petition be dismissed, finds that neither motion is properly before the Court. Neither counsel has been authorized to act for Mr. Lonchar in this matter and he has not requested that any such motion be filed.

IT IS THEREFORE, ORDERED AND ADJUDGED that the motions be DENIED because neither counsel are authorized to act in this matter and because the petition has been dismissed.

This the 23rd day of February 1995.

/s/ Kristina Cook Connelly  
KRISTINA COOK CONNELLY  
Judge, Superior Court  
Lookout Mountain Judicial Circuit

IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

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[Title Omitted in Printing]

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**ORDER OF DISMISSAL**

The instant case came before this Court on Petitioner's original petition for a writ of habeas corpus and his subsequent request and formal notice of dismissal of this action. Based upon Petitioner's statements in his correspondence and at the hearing on June 23, 1994, the Court hereby grants Petitioner's request to dismiss.

IT IS THEREFORE, ORDERED AND ADJUDGED that the petition be DISMISSED without prejudice based upon Petitioner's request and that the stay of execution previously entered in this matter be VACATED.

This the 16th day of January 1995.

/s/ Kristina Cook Connelly  
KRISTINA COOK CONNELLY  
Judge  
Superior Courts

IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

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Civil Action # 95-V-238

HABEAS CORPUS

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MILAN LONCHAR JR.,  
As Next Friend to Larry Grant Lonchar,  
*Petitioner*

vs.

A.G. THOMAS, Warden,  
Georgia Diagnostic and Classification Center,  
*Respondent*

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**ORDER OF THE COURT**

The Court, having convened a hearing at 10:30 A.M. on June 21, 1995, with all parties present, and after hearing arguments, the Court finds as follows:

That Milam Lonchar, Jr. as next friend to Larry Grant Lonchar as petitioner, has no standing through which to bring the habeas corpus petition under consideration in this court.

The Court further heard from the Defendant, Larry Grant Lonchar in open court that he does not wish to be evaluated, that he wishes and wants his execution to be carried out as ordered;

Therefore, it is ordered and adjudged as follows: That the motion for stay of execution is hereby denied and that there has been no evidence offered to the Court that



Mr. Larry Grant Lonchar is incompetent, and that he in his own behalf stated directly to the Court in response to the Court's question that he was in fact competent;

Further, the Court finds these issues have been litigated earlier and that further mental examinations, motions, litigation in this regard is unwarranted.

Therefore, the Court orders execution be carried out during the time as specified in the original execution order.

SO ORDERED, this 21st day of June 1995.

/s/ [Illegible]  
Judge, Superior Courts  
Flint Judicial Circuit

Atlanta June 22, 1995

SUPREME COURT OF GEORGIA

Case No. S95H1500

LONCHAR, a/n/f LONCHAR

v.

THOMAS, Warden

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Upon consideration of the application for a Certificate of Probable Cause, it is ordered that it be hereby denied.

The Motion for Stay of Execution is also denied.

Hunt, C.J., Benham, P. J., Fletcher, Sears, Carley and Thompson, JJ. and Judge G. Alan Blackburn concur. Hunstein, J., disqualified.

[Certification Omitted in Printing]

SEARS, Justice, concurring.

After carefully considering previous proceedings in this case, I believe that Larry Lonchar has knowingly, intelligently, and competently waived his right to seek all post-conviction relief concerning his convictions and sentence of death. See *Gilmore v. Utah*, 429 U.S. 1012 (97 SC 436, 50 LE2d 632) (1976). Larry Lonchar thus forfeited all of his rights to assert the issues that Milan Lonchar now seeks to assert on his behalf. *Id.* For this reason, Milan Lonchar does not have standing to bring either the application for a certificate of probable cause or the motion for stay of execution, *id.* at 1014, and I therefore concur in the decision of the majority to deny both.

[Filed June 22, 1995]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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Civil Action File No. 1:95-CV-1600-JTC

MILAN LONCHAR, JR., as Next Friend to  
Larry Grant Lonchar,  
*Petitioner,*

v.

A.G. THOMAS, Warden  
Georgia Diagnostic and Classification Center,  
*Respondent.*

---

**ORDER**

This action is presently before the Court on Petitioner's Petition for Writ of Habeas Corpus; on Petitioner's Motion for Stay of Execution; on Petitioner's Motion for Order Permitting Psychological Evaluation; and on Respondent's Motion to Dismiss.

**I. FACTS**

Following a jury trial in DeKalb County Superior Court, Larry Grant Lonchar [hereinafter "Lonchar"] was convicted on three counts of malice murder for his participation in the deaths of Charles Wayne Smith, Steven Smith and Margaret Sweat. He was also convicted of aggravated assault, which occurred during the same incident as the murders, on Charles Richard Smith. Lonchar was sentenced to death by electrocution for the three murder convictions and was sentenced to twenty years on the aggravated assault conviction.



The sentences were automatically reviewed, pursuant to Georgia's automatic appeal procedure, and were affirmed. *Lonchar v. State*, 258 Ga. 447, 369 S.E.2d 749 (1988), *cert. denied*, 488 U.S. 1019 (1989). The first execution order was set for March 23-30, 1990.

Lonchar refused to bring any appeals on his convictions or sentence. As such, his sister, Chris Lonchar Kellogg [hereinafter "Kellogg"] brought a habeas corpus petition in the Superior Court of Butts County. Following a hearing into the matter, that court found Lonchar competent to waive his appeals. Thus, the Superior Court of Butts County denied the motion for stay of execution and refused to allow Kellogg to proceed as next-friend.

The Supreme Court of Georgia dismissed the application for certificate of probable cause to appeal that decision. *Kellogg v. Zant*, 260 Ga. 182, 390 S.E.2d 839 (1990). The Supreme Court denied certiorari. *Kellogg v. Zant*, 498 U.S. 890, *reh'g denied*, 498 U.S. 1008 (1990).

A petition for habeas was then filed in this Court. This Court found that an evidentiary hearing into Lonchar's competency was required. Accordingly, the Court conducted a three day hearing. Evidence, including various psychiatric opinions and evaluations of Lonchar and questioning of Lonchar by the Court, was considered.

The Court found Lonchar competent to waive his appeals. Specifically, the Court found that Lonchar understood his position and his options; that no evidence of significant psychotic episodes, substantial distortion of reality, bipolar disease or other mental disease of Lonchar was present in the record; and that even though Lonchar suffered from depression and personality disorders, these problems did not affect his ability to rationally choose among his options. The Court consequently denied Kellogg standing to bring the next-friend petition. *Lonchar v. Zant*, Civil Action No. 1:90-CV-2336-JTC (Feb. 20,

1992). The Eleventh Circuit affirmed this Court's opinion. *Lonchar v. Zant*, 978 F.2d 637 (11th Cir. 1992). Certiorari was denied in the Supreme Court on February 24, 1993. *Lonchar v. Zant*, 113 S.Ct. 1378 (1993). Clemency was denied that same day by the State Board of Pardons and Paroles.

On February 24, 1993, the date of Lonchar's scheduled execution, Lonchar consented to the filing of a habeas petition in his case. A stay of execution was granted.

The habeas petition was assigned to the Honorable Kristina Cook-Connelly, Judge of the Superior Court of Butts County. Before a hearing was set down, Lonchar wrote letters dated September 13, 1993 and May 5, 1994 to the Judge indicating that he wished to fire his attorneys and withdraw his petition. Lonchar mailed similar letters to the Attorney General's Office in July of 1993 and later.

A hearing was held on June 23, 1994. The Court questioned Lonchar and found him competent to withdraw his petition. The Court granted his request to dismiss the petition and to fire his attorneys on January 25, 1995. The dismissal of the petition was without prejudice. A Motion for Reconsideration, filed by Lonchar's former attorneys was denied on February 23, 1995.

Lonchar's former attorneys next filed an Application for Certificate of Probable Cause to Appeal. The Supreme Court of Georgia denied that application on April 6, 1995. A Motion for Reconsideration was filed, and was denied on May 4, 1995. On that same day, the Court also granted the State's Motion to Issue the Remittitur. On May 17, 1995, the remittitur was made the judgment of the Superior Court of Butts County.

On May 7, 1995, Lonchar hired attorney John Matteson to represent him.

A new execution order was signed on June 8, 1995. The execution window was set for between June 23, 1995 and June 30, 1995. The Department of Corrections has set the date and time for the execution as 3:00 p.m. on June 23, 1995.

A next-friend petition was filed in the Superior Court of DeKalb County by Lonchar's brother, Milan. On June 20, 1995 Judge Mallis ruled that Milan Lonchar lacked standing to proceed. On June 22, 1995, the Supreme Court of Georgia affirmed this ruling.

On June 20, 1995, a habeas petition challenging Lonchar's competency was filed in the Superior Court of Butts County. A hearing was held on June 21, 1995. That Court denied Milan Lonchar standing to proceed as next-friend. On June 22, 1995, the Supreme Court of Georgia denied the Certificate of Probable Cause and the Motion for Stay of Execution in this action.

## II. DISCUSSION

As in the next-friend habeas petition filed in this Court in 1990 in this case, the primary issue before this Court is whether the next-friend has standing to pursue the claims of and to bring motions on behalf of Mr. Lonchar.

An individual lacks standing as a next-friend unless he can show that 1) the person on whose behalf he brings the claim is somehow incapable or unable to bring the claim, and 2) that he has a sufficient relationship and interest with the person to qualify as "next-friend." *Weber v. Garza*, 570 F.2d 511, 513-14 (5th Cir. 1978). The current next-friend is Mr. Lonchar's brother, Milan. The sibling relationship is a sufficient relationship and interest to satisfy the second element necessary for next-friend standing. See *Smith v. Armontrout*, 812 F.2d 1050 (8th Cir.), cert. denied, 483 U.S. 1033 (1987).

Mental incompetence is sufficient reason to satisfy the first prong of the test for next-friend standing. *Whitmore*

*v. Arkansas*, 110 S.Ct. 1717, 1727 (1990). Thus, it is only if Mr. Lonchar is incompetent that his brother Milan will have standing to bring the habeas petition on his behalf.

The Court starts the inquiry into the mental competence of Lonchar with the history of the case. In this case, numerous authorities, including this Court have found Lonchar to be competent to waive his appeals. The first was the Superior Court of Butts County. After a hearing into Lonchar's competency, that Court found him competent. (Order of March 29, 1990). The Supreme Court of Georgia agreed when it dismissed the Certificate of Probable Cause on appeal of the competency hearing. *Kellogg v. Zant*, 260 Ga. 182, 390 S.E.2d 839 (1990), cert. denied, 498 U.S. 890 (1990), reh'g denied, 498 U.S. 1008 (1990).

This Court conducted an extensive evaluation into Lonchar's competency through review of extensive records and by means of a comprehensive hearing. The testimony of three well qualified forensic psychiatrists who thoroughly evaluated Mr. Lonchar and his ability to understand and rationally decide between his options was presented at that hearing. The Court found that Lonchar was not suffering from a mental disease, disorder or defect that substantially affected his capacity to choose between his options. Accordingly, the Court found that Lonchar was competent to waive his appeals and had done so voluntarily. *Lonchar v. Zant*, Civil Action No. 1:90-CV-2336 (Feb. 18, 1990), aff'd, 978 F.2d 637 (11th Cir. 1992), reh'g denied en banc, 983 F.2d 1084 (11th Cir. 1993), stay denied and cert. denied, *Kellogg v. Zant*, 113 S.Ct. 1378 (1993).

"Once a finding as to mental condition has been fairly and properly made, '[the] State . . . may properly presume that petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing proc-



ess.' " *Smith v. Armontrout*, 865 F.2d 1502, 1506 (8th Cir. 1988). Petitioner fails to present significant evidence which would require reexamination of the previous finding.

Lonchar's next-friend relies primarily upon the affidavits of Dr. Herendeen as evidence of Lonchar's incompetence. The record is, however, void of any evidence to establish Herendeen's qualifications to render the opinions he offers. The affidavit shows that Herendeen is a psychologist, rather than a psychiatrist, with an Ph.D in Experimental Psychology. He works for the Psychology Center in Douglasville.

In the affidavit, Herendeen states in a conclusory manner that Lonchar is incompetent to waive his appeals. Herendeen fails to provide the basis for his opinion and fails to relate the facts upon which he relies to the legal standard. Naked assertions of incompetence are insufficient to create a bona fide doubt as to competency of an individual which would require a hearing. *Streetman v. Lynaugh*, 674 F. Supp. 229, 236 (E.D. Tex. 1987), citing, *Jordan v. Wainwright*, 457 F.2d 338 (5th Cir. 1972).

Furthermore, Herendeen saw Lonchar on nine occasions as a counsellor and performed no psychological evaluation of him. Herendeen admits that a formal psychological evaluation is necessary for him to reach a conclusion as to Lonchar's competence. In contrast, the Court's prior determination as to Lonchar's competence was based on evidence received from three well-qualified forensic psychiatrists after they completed a formal evaluation of Lonchar.

For these reasons, the Court cannot credit Dr. Herendeen's opinion. However, the Court will consider the various intervening factors which the next-friend asserts require a reevaluation of Lonchar's competency.

The intervening factors alleged by the next-friend are the 1) waiver in Lonchar's desire to appeal; 2) an at-

tempted suicide; 3) a statement by Dr. Herendeen that Lonchar evidences self-mutilation and manic episodes; and 4) the passage of time. The Court finds that the allegations made by the next-friend are legally insufficient to require a reexamination of Lonchar's competence to waive his appeals.

The mere passage of time is an insufficient factor in itself to require new hearings into Lonchar's competency to waive his appeals. The affidavit of Dr. Davis merely states that the passage of time prevents him from being able to state that his prior opinion as to Lonchar's mental state reflects Lonchar's present condition. This affidavit does not, however, state that his prior opinion is likely to change or that any evidence requires him to conclude that Lonchar, despite his mental disorders, would now be unable to make a rational choice. Thus, the Court finds that this factor does not warrant an evidentiary hearing into the matter.

The fact that Lonchar has changed his mind regarding his desire to waive his appeal on one occasion is also insufficient to require a new competency hearing. *Smith*, 865 F.2d at 1504. "[C]ompetent people do change their minds, even about very important matters. . ." *Id.*<sup>1</sup>

The next-friend petition alleges that Lonchar attempted to commit suicide by slashing his wrist in 1993.<sup>2</sup> If true, this allegation is consistent with the previous psychological history of Lonchar. At the time of the previous determination, Lonchar's mental disorders were found not to

<sup>1</sup> Lonchar states that he only changed his mind and decided to file an appeal because he was told that unless he did so, his brother Paul would commit suicide. (Hearing before Judge Smith, TR. p. 25.) This reason suggests that his change of mind was merely the result of outside pressure, rather than reflective of a lack of competency.

<sup>2</sup> The record presents no evidence of this fact except Herendeen's statement. Herendeen first saw Lonchar in January of 1994 and offers no foundation for his knowledge in this regard.

prevent him from appreciating his position and making a rational decision among his alternatives.

Further, a suicide attempt does not necessarily reflect incompetence pursuant to the *Rees* standard. See *Rumbaugh v. Procunier*, 753 F.2d 395 (5th Cir.), *cert. denied*, 473 U.S. 919 (1985) (inmate found competent to waive appeals even though he had made several suicide attempts and engaged in self-mutilating behavior); *Smith v. Armontrout*, 812 F.2d 1050 (8th Cir.), *cert. denied*, 483 U.S. 1033 (1987) (inmate found competent to waive his appeals despite depression which manifested itself in suicide attempts and self-mutilating behavior). Thus, the Court finds that this factor, even if true, is insufficient to create any issue as to Lonchar's competency.

Through the affidavit of Herendeen, Petitioner attempts to present evidence that Lonchar suffers from bi-polar disorder. This, Petitioner claims, is evidence of incompetency sufficient to warrant a hearing. To circumvent the Court's prior conclusion that Lonchar does not suffer from bi-polar disorder, Herendeen states that "Mr. Lonchar has concealed his history of manic episodes from those [prior] evaluators, which deprived them of the information essential to a proper diagnosis. Mr. Lonchar has said that he lied to the state experts when they asked him whether he had ever had manic phases, and that he couldn't believe that they did not evaluate him in a context and environment in which his manic episodes would have been revealed to them."<sup>3</sup> The Court, however, in accepting the opinions of those prior evaluators as to the lack of bi-polar disorder also reviewed the extensive prison and medical records for Mr. Lonchar.<sup>4</sup> Those records

<sup>3</sup> In the motion, the next-friend alleges that Lonchar today acknowledged that he is in a manic phase. No evidence to support this allegation is presented. As such, this naked assertion is entitled to little weight.

<sup>4</sup> The records are extensive because Mr. Lonchar has spent the majority of his adult life in prison.

showed a complete lack of evidence of any manic phase. In fact, those records were reviewed by Dr. Kuglar who opined that Lonchar did not suffer from bi-polar disorder. See testimony of Kuglar, TR. p.349.<sup>5</sup>

Significantly, Herendeen's affidavit fails to state that *he* concludes that Lonchar suffers from bi-polar disorder. Nor does he state that his observations of Lonchar even suggest such a diagnosis.

Thus, the assertion from Herendeen that Lonchar "lied" to the doctors about his condition is not persuasive and fails to create a genuine issue of material fact which would warrant a new hearing into Lonchar's competency.

No evidence or allegation made by Petitioner provides the substantial evidence of incompetence necessary to overcome the presumption of competence, which is the law of the case. Nor does anything in any of those affidavits suggest that Lonchar, despite his acknowledged mental disorders, lacks understanding of his legal position and options available to him or lacks the ability to make a rational choice among his options.

Finally, the Court has reviewed the transcripts of the recent proceedings before the Honorable Kristina Cook-Connelly and the Honorable E. Byron Smith. Mr. Lonchar appeared personally in both proceedings. Both are Superior Court Judges who as part of their everyday duties evaluate the demeanor, competence and resulting voluntariness of waivers made by defendants in serious criminal cases. Both accepted Mr. Lonchar's ability to voluntarily waive further proceedings. As when Mr. Lonchar appeared before this Court, he appeared to understand his position and be able to make a rational choice with respect to continuing or abandoning further litigation.

<sup>5</sup> Dr. Davis' testimony indicates what materials he reviewed in assessing Mr. Lonchar. (TR. p. 203) This review did not include the prior prison records, but did include affidavits of family members, others' reports and other information.



For the foregoing reasons, the Court finds that the presumption of competency established through the prior decisions of this and other Courts must be observed in that the next-friend fails to present new evidence of incompetence substantial enough to raise a genuine issue of material fact as to the matter. Larry Lonchar now wishes to accept the presumptively lawful judgment of the Courts of the State of Georgia. He understands the consequences of that decision and, having been found competent, the law allows him to decide. Accordingly, Milan Lonchar may not appear as next-friend for his brother, Larry Lonchar, in this action. For that reason, Respondent's Motion to Dismiss is GRANTED. The Motion for Order Permitting Psychological Evaluation is DENIED; the Motion for Stay of Execution is DENIED; and the Petition for Writ of Habeas Corpus is DENIED.

SO ORDERED, this 22 day of June, 1995.

/s/ Jack T. Camp  
JACK T. CAMP  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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[Title Omitted in Printing]

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**ORDER**

Considering the evidence presented by Petitioner, reasonable jurists could not debate whether this is significant evidence of the incompetency of Lonchar. Therefore, the Court DENIES Petitioner's Application for Certificate of Probable Cause.

Petitioner's Application for Certificate of Appeal *In Forma Pauperis* and for Certificate that the Appeal is taken in Good Faith is DENIED. Petitioner's Stay of Execution Pending Appeal is DENIED.

SO ORDERED, this 22 day of June, 1995.

/s/ Jack T. Camp  
JACK T. CAMP  
United States District Judge

[Filed Jun. 23, 1995]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 95-8799

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MILAN LONCHAR, JR., as  
Next-Friend to Larry Lonchar,  
*Petitioner-Appellant,*

versus

ALBERT G. THOMAS, Warden,  
Georgia Diagnostic and Classification Center,  
*Respondent-Appellee.*

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Appeal from the United States District Court  
for the Northern District of Georgia

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Before TJOFLET, Chief Judge, COX and DUBINA,  
Circuit Judges,

BY THE COURT:

Mr. Milan Lonchar, Jr., (Milan) acting as next friend to his brother Larry Grant Lonchar (Larry), has applied to this court for a certificate of probable cause to appeal, and for leave to proceed in forma pauperis. Larry's execution is scheduled for three o'clock this afternoon, June 23, 1995. The district court has dismissed Milan's petition for habeas corpus and denied his application for a certificate of probable cause.

Milan only has standing to bring this petition for writ of habeas corpus on his brother's behalf if Larry is incompetent to do so on his own. *Whitmore v. Arkansas*, 495 U.S. 149, 163, 110 S. Ct. 1717, 1727 (1990). Without holding an evidentiary hearing, the district court concluded that Milan lacks standing to prosecute the action on his brother's behalf. The district court based its conclusion on two reasons. First, Milan has not proffered sufficient evidence to call into question prior federal court findings of Larry's competency to waive his rights. Second, a state court this week found that Larry remains competent to waive his rights.

We agree with the district court that a presumption of continued competency arises from a prior finding of competency. *Smith v. Armontrout*, 865 F.2d 1502, 1505 (8th Cir. 1988). Larry's sister, Chris Kellogg, previously filed a federal habeas petition on Larry's behalf. At that time, the district court conducted an extensive evidentiary hearing as to Larry's competency to bring an action on his own behalf. Based on expert testimony, the district court found Larry competent to waive his rights under the standard of *Rees v. Peyton*, 384 U.S. 312, 314, 86 S. Ct. 1505, 1506 (1966), that a person is incompetent when a mental disease or disorder hinders the person's understanding of his legal position and options and prevents him "from making a rational choice among his options." *Lonchar v. Zant*, 978 F.2d 637, 641 (11th Cir. 1992).

The district court correctly concluded that Milan has not proffered evidence sufficient to warrant an evidentiary hearing to question this prior finding of competence. The prior finding therefore stands, and Milan lacks standing to pursue this petition on Larry's behalf. We further find that Milan's lack of standing is not "debatable among jurists of reason." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 3394 (1983).

For these reasons, the application for certificate of probable cause is DENIED. While no request for a stay



of execution has been filed, we deem the request for a certificate of probable cause to implicitly include such a request, and the request is DENIED. The motion for leave to proceed in forma pauperis is DENIED as moot.

[Filed Jun. 28, 1995]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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Civil Action File No. 1:95-CV-1656-JTC

LARRY GRANT LONCHAR,  
*Petitioner,*

v.

A.G. THOMAS, Warden,  
Georgia Diagnostic and Classification Center,  
*Respondent.*

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**ORDER**

This action is presently before the Court on Petitioner's Petition for Writ of Habeas Corpus; on Petitioner's Motion for Stay of Execution; on Petitioner's Motion for Evidentiary Development; and on Respondent's Motion to Dismiss.

**I. STATEMENT OF CASE**

Following a jury trial in Dekalb County Superior Court, Larry Grant Lonchar [hereinafter "Lonchar"] was convicted on three counts of malice murder for his participation in the deaths of Charles Wayne Smith, Steven Smith and Margaret Sweat. He was also convicted of aggravated assault, which occurred during the same incident as the murders, on Charles Richard Smith. Lonchar was sentenced to death by electrocution for the three murder convictions and was sentenced to twenty years on the aggravated assault conviction.

The sentences were automatically reviewed, pursuant to Georgia's automatic appeal procedure, and were affirmed. *Lonchar v. State*, 258 Ga. 447, 369 S.E.2d 749 (1988), *cert. denied*, 488 U.S. 1019 (1989). The first execution order was set for March 23-30, 1990.

Lonchar refused to bring any appeals on his convictions or sentence. As such, his sister, Chris Lonchar Kellogg [hereinafter "Kellogg"] brought a habeas corpus petition in the Superior Court of Butts County. Following a hearing into the matter, that court found Lonchar competent to waive his appeals. The Superior Court of Butts County then denied the motion for stay of execution and refused to allow Kellogg to proceed as next-friend.

The Supreme Court of Georgia dismissed the application for certificate of probable cause to appeal that decision. *Kellogg v. Zant*, 260 Ga. 182, 390 S.E.2d 839 (1990). The Supreme Court denied certiorari. *Kellogg v. Zant*, 498 U.S. 890, *reh'g denied*, 498 U.S. 1008 (1990).

A petition for habeas was then filed in this Court. This Court found that an evidentiary hearing into Lonchar's competency was required. Accordingly, the Court conducted a three-day hearing. Evidence, including various psychiatric opinions and evaluations of Lonchar and questioning of Lonchar by the Court, was considered.

The Court found Lonchar competent to waive his appeals. Specifically, the Court found that Lonchar understood his position and his options; that no evidence of significant psychotic episodes, substantial distortion of reality, bipolar disease or other mental disease of Lonchar was present in the record; and that even though Lonchar suffered from depression and personality disorders, these problems did not affect his ability to rationally choose among his options. The Court consequently denied Kellogg standing to bring the next-friend petition. *Lonchar v. Zant*, Civil Action No. 1:90-CV-2336-JTC

(Feb. 20, 1992). The Eleventh Circuit affirmed this Court's opinion. *Lonchar v. Zant*, 978 F.2d 637 (11th Cir. 1992). Certiorari was denied in the Supreme Court on February 24, 1993. *Lonchar v. Zant*, 113 S.Ct. 1378 (1993). Clemency was denied that same day by the State Board of Pardons and Paroles.

On February 24, 1993, the date of Lonchar's scheduled execution, Lonchar consented to the filing of a habeas petition in his case. A stay of execution was granted.

The habeas petition was assigned to the Honorable Kristina Cook-Connelly, Judge of the Superior Court of Butts County. Before a hearing was set down, Lonchar wrote letters dated September 13, 1993 and May 5, 1994 to the Judge indicating that he wished to fire his attorneys and withdraw his petition. Lonchar mailed similar letters to the Attorney General's Office in July of 1993.

A hearing was held on June 23, 1994. The Court questioned Lonchar and found him competent to withdraw his petition. The Court granted his request to dismiss the petition and to fire his attorneys on January 25, 1995. The dismissal of the petition was without prejudice. A Motion for Reconsideration, filed by Lonchar's former attorneys, was denied on February 23, 1995.

Lonchar's former attorneys next filed an Application for Certificate of Probable Cause to Appeal. The Supreme Court of Georgia denied that application on April 6, 1995. A Motion for Reconsideration was filed, and was denied on May 4, 1995. On that same day, the Court also granted the State's Motion to Issue the Remittitur. On May 17, 1995, the remittitur was made the judgment of the Superior Court of Butts County.

On May 7, 1995, Lonchar hired attorney John Mattieson to represent him.

A new execution order was signed on June 8, 1995. The execution window was established between the dates



of June 23, 1995 and June 30, 1995. The Department of Corrections has set the date and time for the execution at 3:00 p.m. on June 23, 1995.

A next-friend petition was filed in the Superior Court of DeKalb County by Lonchar's brother, Milan. On June 20, 1995 Judge Mallis ruled that Milan Lonchar lacked standing to proceed. On June 22, 1995, the Supreme Court of Georgia affirmed this ruling.

On June 20, 1995, a habeas petition challenging Lonchar's competency was filed in the Superior Court of Butts County. A hearing was held on June 21, 1995. That Court denied Milan Lonchar standing to proceed as next-friend. On June 22, 1995, the Supreme Court of Georgia denied the Certificate of Probable Cause and the Motion for Stay of Execution in this action.

On June 22, 1995, this Court denied Milan Lonchar's next-friend habeas petition for lack of standing. The Eleventh Circuit affirmed on June 23, 1995.

On June 23, 1995, Larry Lonchar filed a full petition for writ of habeas corpus in the Superior Court of Butts County. A short hearing was held. On June 26, 1995, Judge Smith of the Superior Court of Butts County denied the writ, based on a procedural bar and did not consider the merits of the petition. A motion for reconsideration was denied on June 27, 1995. The Supreme Court of Georgia affirmed on June 27, 1995.

Larry Lonchar has now filed a petition for writ of habeas corpus in this Court.

## II. FINDINGS OF FACTS

This Court held an evidentiary hearing to allow the parties to present evidence upon issues raised in Respondent's Motion to Dismiss. The parties agreed that the record before the Court also consists of the record in the next-friend petition filed on behalf of Lonchar (*Lonchar v. Zant*, Civil Action No. 90-CV-2336-JTC), the tran-

scripts of hearings held in the State court habeas proceedings and orders entered in the State habeas proceedings. Based upon this record, the Court makes the following findings of fact.

Larry Lonchar is aware of the prior history of this litigation which is detailed in the Statement of the Case. Lonchar participated in an extensive evidentiary hearing held in the next-friend case in this Court. *Id.* The Court questioned Lonchar and found as follows:

Mr. Lonchar understands his options clearly: that federal habeas corpus is the last opportunity for him to obtain review of his sentence; that there are substantial arguments that his sentence should be overturned; and that failure to pursue this option will result in his execution.

The Court concluded that Mr. Lonchar was competent to waive further review of his sentence, knowingly and voluntarily waived further review, and dismissed the next-friend petition on February 13, 1993.

Lonchar's execution was scheduled for February 24, 1993. Lonchar's attorney, Mr. Clive Stafford-Smith told Lonchar shortly before the execution that his brother would kill himself if the execution were carried out. As a result, Lonchar filed a petition in state court minutes before the scheduled execution.

Petitioner soon decided to withdraw the petition and wrote the state court judge requesting to dismiss his petition. He first requested that the petition be dismissed on September 13, 1993 in letters to the Judge. The state court entered an order dismissing the petition on January 25, 1995.

Lonchar was aware of the availability of habeas corpus relief during this entire period and had discussed it with his attorney. Lonchar offered no reason for his failure to pursue review of his sentence except that he chose not to

do so. He was aware of the potential legal arguments and their factual predicates. Not only did he decline to pursue further review of his sentence, on at least three occasions he knowingly and voluntarily waived further review of his sentence in open court.

The execution was rescheduled for June 23, 1995. On June 20, 1995, his brother brought another next friend petition. Again Lonchar declined to participate. Both the State and Federal courts dismissed the petition because of the lack of evidence that Lonchar was incompetent to make this decision. The Eleventh Circuit Court of Appeals decision was entered of June 23, 1995.

Within hours of his execution, Lonchar for the second time filed an application for writ of habeas in the State Courts. He agreed to file the petition after Mr. Stafford-Smith and his other attorneys advised him that the legislature might change the law to allow a different method of execution so that he could donate his organs.

The present petition is the first brought by Lonchar in Federal Court.

Lonchar is familiar with and wishes to assert the claims in his present habeas petition; however, his purpose in asserting the claims is not to obtain a review of the constitutionality and possible errors in his sentence. His sole purpose in asserting the claims is to delay his execution so that the method of execution may be changed to allow him to donate his organs upon death.

### III. CONCLUSIONS OF LAW

Lonchar files this habeas petition seeking review in this Court of possible constitutional errors arising from his trial and death sentence.

As a general rule, a district court shall entertain an application for a writ of habeas corpus by a person in the State's custody pursuant to the judgment of the State

court if that application alleges federal constitutional errors. 28 U.S.C. § 2254.

In its Motion to Dismiss, Respondent raises the defense of abuse of the writ. The writ of habeas corpus is an equitable remedy, *Gomez v. United States District Court*, 112 S.Ct. 1652, 1653 (1992), which provides "a means by which the legal authority under which a person is detained can be challenged." Wright, Miller & Cooper, *Federal Practice & Procedure* § 4261 (1988).

The abuse of the writ doctrine arose as an equitable response to successive applications because res judicata principles are inapplicable to habeas corpus cases. *McCleskey v. Zant*, 111 S.Ct. 1454, 1463 (1991); *Darden v. Dugger*, 825 F.2d 287, 293 (1987), cert. denied, 485 U.S. 943 (1988). The doctrine is incorporated into Rule 9(b):

second or successive petition[s] may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits, or if new and different grounds are alleged, the judge finds that the failure to the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Rule 9 (b). Rules Governing § 2254 Cases. Thus under the abuse of the writ doctrine, a habeas petitioner may be denied review of his alleged constitutional errors where successive writs are filed. "Nothing in the traditions of habeas corpus review requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass or delay." *Sanders v. United States*, 373 U.S. 1, 18 (1963).

Under the abuse of the writ doctrine the State must plead an abuse of the writ with particularity. *McCleskey v. Zant*, 111 S.Ct. 1454 (1991). This burden is satisfied where the State notes the petitioner's prior writ history, identifies the claims which appear for the first time, and



alleges that petitioner has abused the writ. *Id.* at 1456. The State, in this instance, has met that burden.

The State has shown that despite 8 years of litigation over these claims, and numerous opportunities to join in the litigation, Lonchar has explicitly refused to bring these claims. In fact, in the first next-friend petition, the Court found that Lonchar made a voluntary and knowing waiver of his right to appeal on the claims. In this petition, Lonchar brings the same claims, with the exception of the claim on the method of execution, that have been brought in the prior next-friend petitions.

Further, the State alleges that Lonchar brings these claims solely for the purpose of delay. That allegation is supported by Lonchar's own testimony at the evidentiary hearing conducted in this case.

Once the State meets its burden, the burden shifts to the Petitioner to explain the reasons that make it "fair and just for the Court to overlook the delay." *McCleskey*, 111 S.Ct. at 1464. Petitioner must show "cause—e.g. that he was impeded by some objective factor external to the defense, such as governmental interference or the reasonable unavailability of the factual basis for the claim—as well as actual prejudice resulting from the errors of which he complains." *Id.* at 1456-57.

Lonchar fails to come forward with either objective or subjective reasons to excuse the conduct.<sup>1</sup> Lonchar previously had the opportunity to obtain collateral review of all the present issues and voluntarily declined to do so. Petitioner's reason for not raising the claims asserted in his habeas petition sooner are that he has just recently been convinced that he may be able to do some good by offering his organs for donation following his execution. This is not sufficient reason for failing to raise these issues when he previously had the opportunity to do so. Lon-

<sup>1</sup> The Court has considered the proffer of evidence put on by Lonchar, as well as his testimony in making this determination.

char's failure to raise these issues earlier is certainly inexcusable negligence, if not voluntary abandonment.

The rule which authorizes dismissal for abuse of the writ, however, only applies to successive petitioners. See *McCleskey*, 111 S.Ct. 1454; Rule 9(b). The Court has been unable to find any case where petitioner's first petition for habeas corpus seeking review of constitutional errors in the federal courts has been dismissed for abuse of the writ.

The present petition is the first habeas petition filed in federal Court by Lonchar personally. The issue then is whether a first federal habeas petition filed at the eleventh hour for the purpose of delay and resulting from inexcusable negligence in not seeking earlier review can be dismissed as an abuse of the writ.

The purposes of the abuse of the writ doctrine would be served by affording full effect to the doctrine in this instance. One of the law's objects is finality of judgments. *McCleskey*, 111 S.Ct. at 1468. Allowing manipulation of the system defeats this interest. Disrespect for the judicial system arises when manipulation of the system is allowed to endlessly extend the appeals so that there is no finality. Further, without finality, no deterrent effect flows from the penalty. *McCleskey*, 111 S.Ct. at 1468. Finally, deference to the State's enforcement of its laws is validated by adhering the abuse of writ doctrine where this degree of manipulation has been observed.

Despite strong policy and equitable reasons which support the doctrine, the Eleventh Circuit's holding in *Davis v. Dugger*, 829 F.2d 1513 (11th Cir. 1987) indicates it does not apply to a first petition. In that case, the Eleventh Circuit reversed the District Court's ruling that there was an abuse of a writ on a first habeas petition where the abuse arose from the intentional delay of filing of the writ until just prior to the execution. The Eleventh Circuit determined that the petition could not be dismissed

under the traditional abuse of the writ doctrine embodied in Rule 9(b) because that rule is expressly limited to successive writs. *Id.* at 1518. The Court determined that a first petition could not constitute a successive writ. *Id.*

Rule 9(b) of the Rules Governing § 2254 Cases codifies the common law concerning abuse of the writ, as was stated in *Sanders v. United States*, 373 U.S. 1 (1962). Neither the Rule nor the common law allow application of the doctrine where there is no successive petition.

For that reason, although the Court finds that Petitioner's conduct otherwise constitutes an abuse of the writ, since it is a first petition, the Court feels constrained to deny the Motion to Dismiss based on abuse of the writ.

#### IV. CONCLUSION

For the foregoing reasons, Respondent's Motion to Dismiss on the above ground is DENIED. Petitioner's Motion for Stay of Execution is GRANTED; Petitioner's Motion for Evidentiary Development is DENIED AS MOOT.

SO ORDERED, this 28 day of June, 1995.

/s/ Jack T. Camp  
JACK T. CAMP  
United States District Judge

[Filed Jun. 28, 1995]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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[Title Omitted in Printing]

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#### ORDER

Petitioner's sentences of death were affirmed on direct appeal. At the time of the first scheduled execution, a full round of next-friend petitions were brought which were denied for lack of standing in the state and federal courts.

Just prior to his execution in 1993, Petitioner agreed to file a state habeas action. This action was dismissed, without prejudice, pursuant to the Petitioner's request.

A second round of next-friend petitions were filed, which were denied in both the state and federal courts for lack of standing. Hours prior to the execution, Petitioner filed a full state habeas action. Judge Smith of the Superior Court of Butts County denied the petition, essentially finding that it was an abusive writ brought for manipulative purposes.

This matter now comes before this Court on the first habeas petition filed by Petitioner. Normally a prisoner is entitled to federal review of the conviction and sentence for errors of a constitutional magnitude. The petition presents significant constitutional issues concerning the validity of Petitioner's trial and sentence. None of these issues have been reviewed in an federal court proceeding. The State maintains Petitioner is precluded from filing his Petition because his actions have amounted to an abuse



of the writ of habeas corpus. Petitioner, in this instance, may have waived the right to review. However, the issue of waiver requires further consideration. In view of the irrevocability of the death penalty, the Court GRANTS a temporary stay of execution so that this issue can be carefully considered. The State is HEREBY ORDERED to immediately STAY the execution of Larry Grant Lonchar until further order of this Court.

SO ORDERED, this 28 day of June, 1995.

/s/ Jack T. Camp  
FOR JACK T. CAMP  
United States District Judge

[Filed Jun. 29, 1995]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 95-8821

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LARRY GRANT LONCHAR,  
*Petitioner-Appellee,*  
versus

ALBERT G. THOMAS, Warden,  
Georgia Diagnostic and Classification Center,  
*Respondent-Appellant.*

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Appeal from the United States District Court  
for the Northern District of Georgia

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Before TJOFLAT, Chief Judge, COX and DUBINA,  
Circuit Judges.

BY THE COURT:

Larry Grant Lonchar's request for a temporary stay of execution pending consideration of his emergency petition for rehearing with suggestion of rehearing en banc is DENIED.

The petition for panel rehearing is DENIED. The mandate shall issue immediately.

IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

No. 90-V-2735

HABEAS CORPUS

CHRIS LONCHAR KELLOGG,  
As Next Friend For Larry Lonchar,  
vs. *Petitioner,*

WALTER D. ZANT, Warden,  
Georgia Diagnostic and Classification Center,  
*Respondent.*

**PETITION FOR WRIT OF HABEAS CORPUS**

Chris Lonchar Kellogg, as next friend for Larry Grant Lonchar, petitions this Court for a Writ of Habeas Corpus, pursuant to O.C.G.A. §§ 9-14-41 *et seq.* Mr. Lonchar is an indigent person currently under sentence of death, and scheduled to be executed Friday, March 23, 1990. Respondent is the Warden of the Georgia Diagnostic and Classification Center in Jackson, Georgia. The allegations of this petition are set forth as follows:

**I. HISTORY OF PRIOR PROCEEDINGS**

(1) The name and location of the court which entered the judgment of conviction and sentence under attack are:

Superior Court of DeKalb County  
Decatur, Georgia

(2) The date of the judgment of conviction was June 25, 1987. Petitioner was absent during his trial and during significant portions of his sentencing proceeding.

(3) The date of the judgment of sentence was June 27, 1987; the sentence was that Petitioner be put to death by electrocution for the crime of malice murder.

(4) The nature of the offense involved is that Petitioner was convicted of murder, in violation of O.C.G.A. Section 16-5-1.

(5) At his trial, Petitioner pled not guilty.

(6) The trial on the issue of guilt or innocence and on the issue of sentence was had before a jury.

(7) Petitioner did not testify at the guilt/innocence trial. Petitioner did not testify at the penalty phase of the trial. In fact, Petitioner did not attend.

(8) Petitioner's case was heard upon automatic appeal to the Georgia Supreme Court. The facts of Petitioner's appeal are as follows:

a. On July 13, 1988, the Supreme Court of Georgia affirmed Petitioner's conviction and sentence. *Lonchar v. State*, 258 Ga. 447, 369 S.E.2d 749 (1988). Rehearing was denied on July 31, 1988.

b. On January 9, 1989, the Supreme Court of the United States, with Justices Brennan and Marshall dissenting, denied a Petition for Writ of Certiorari filed on Petitioner's behalf. *Lonchar v. Georgia*, — U.S. —, 109 S.Ct. 818 (1989). A timely-filed Petition for Rehearing was denied on February 27, 1989. *Lonchar v. Georgia*, — U.S. —, 109 S.Ct. 1332 (1989).

(9) On March 8, 1990, after and only because Petitioner wrote a letter to his sentencing judge requesting such action, the Superior Court of DeKalb County ordered that Petitioner's sentence of death be carried out between noon March 23, 1990, and noon on March 30, 1990.

(10) On March 14, 1990, the trial court refused to vacate his order, and transferred various questions to this Court for consideration. On March 20, 1990, the Supreme Court dismissed a motion to stay Petitioner's execution as premature, referring it also to this Court for consideration.



## II. CHRIS LONCHAR KELLOGG AS NEXT FRIEND

Mr. Lonchar has a right to seek further review of his conviction and sentence of death pursuant to state and federal habeas corpus proceedings. O.C.G.A., § 9-14-42, *et. seq.*; 28 U.S.C. § 2254. If he is not competent to pursue state remedies, *Gilmore v. Utah*, 429 U.S. 1012 (1976); *Lenhard v. Wolff*, 100 S.Ct. 3 (1979), or federal remedies, *Rees v. Peyton*, 384 U.S. 312, 313 (1966), then a "next friend" may properly pursue those remedies in his stead. *Id.*; see also *Rumbaugh v. Procnier*, 753 F.2d 395 (5th Cir. 1985).

Mr. Lonchar's sister appears here as next friend. She and other family members visited with Mr. Lonchar Saturday and Sunday, March 17-18, 1990. On Monday, March 19, 1990, an eminently qualified mental health expert, Robert T.M. Phillips, M.D., Ph.D, met with and evaluated Mr. Lonchar. See Appendix 1. Based upon the available background material and other evidence, gathered under incredibly difficult circumstances, and based upon Dr. Phillips' exhaustive evaluation and diagnosis, it is clear under the standards announced by the United States Supreme Court that there is a serious question of Mr. Lonchar's competency to waive his state and federal rights, and a stay of execution is proper in order properly to address the issue. Specifically, it is clear that Mr. Lonchar does not have "the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation," and that "he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity . . . ." *Rees v. Peyton*, 384 U.S. 312, 314 (1966). The question of Mr. Lonchar's competence is of "prime importance," *id.*, 384 U.S. at 314, and his execution cannot be countenanced under these circumstances.

Dr. Phillips conducted a prolonged physical, neurological, and mental examination of Mr. Lonchar, and reviewed extensive background materials, some of which

are submitted with this petition as Appendix Sections A-F.<sup>1</sup> Appendix A contains Dr. Phillips' affidavit report and his curriculum vitae. It will not be reproduced here in its entirety, but for purposes of this section, it is important to note at least the following. Mr. Lonchar was raised by abusive and hopelessly alcoholic parents, in whose presence and at whose hand he experienced a most horrifying infancy and adolescence. His mother was and is tragically mentally ill, and the violent break-up of her marriage to Petitioner's father when Petitioner was thirteen (13) years old propelled Petitioner into a psychiatric break from which he has yet to recover. The underlying psychiatric and neurological dysfunctions from which he suffers were severely exasperated by his early childhood experiences, and now fuel his suicidal, psychotic, and patently out of control actions.

Specifically, Dr. Roberts found the severe psychotic illness known as Bipolar Disorder, in combination with an underlying neurologic disorder consistent with traumatic brain damage possibly consistent with a diagnosis of temporal lobe epilepsy, a seizure disorder, and in addition a personality disorder, all resulting in Petitioner having substantially diminished mental capacity. As Dr. Phillips' describes it:

In my professional medical judgement, the etiology of this severe social dysfunction is in large part

<sup>1</sup> In order properly to determine competency to waive appellate rights, a thorough psychiatric and psychological study is imperative. "[E]xtended, close observation in a proper setting is generally recognized as essential for the psychiatric and psychological evaluations required." *Hayes v. Murphy*, 663 F.2d 1004 (10th Cir. 1981) (emphasis added). It is necessary that the evaluator interview family members, obtain background information about the client from institutions with which he or she has been involved, conduct physical and neurological exams, a mental status exam, and observe and interview the patient over a substantial period of time. *Id.*, 663 F.2d, footnotes 13-15. The type of exam for such an evaluation was conducted, to the extent possible, by Dr. Phillips, and his methodology is further discussed in Claim IV, *infra*.

attributable to a well-documented and long standing underlying psychiatric illness which has been characterized by the evidence of a psychotic thought disorder which has presented with a mixture of affective features including a normally and persistently elevated and irritable mood; an inflated self-esteem or grandiosity, a decreased need for sleep, psychomotor agitation and an excessive involvement in activities which have a high potential for painful self-consequences. These features have subsequently and cyclically yielded the signs and symptoms of a depressed and irritable mood; a markedly diminished interest in all activities and an increasing subjective sense of apathy and/or self-deprecatory thought; insomnia, restlessness, feelings of worthlessness and excessive inappropriate self reproach all in the context of obsessional characteristics that further complicate the broad affective excursion present in this individual. Consequently, I hold the opinion within a reasonable degree of certainty that Mr. Larry Lonchar suffers from a psychiatric illness known as Bipolar Disorder (Manic Depression) and that he has been profoundly impacted by his illness in such a way as to contribute substantially to his history of aberrant behavior.

Additionally, in my professional medical judgment, further contributing to the etiology of Mr. Lonchar's severe social dysfunction is the history of a chaotic and disruptive childhood in which there was an absence of consistent and appropriate nurturance from his biological parents, ineffective parenting by his grandparents, and unnatural "adultification" of himself and his siblings due to the inherent psychopathology of his family unit, and a personal assumption of guilt and responsibility for the failure of his parent's marriage. The consequences of his unfortunate developmental history are clinically manifested on examination by a personality organization that is

inflexible and maladaptive to stress, disabling in his capacity to work productively; conflicted in his guilt, rage, and misguided sense of responsibility and constrained by the absence of parental love or its surrogate; and further exacerbated by interpersonal conflict which has predisposed this individual to immature, regressive and violent behavior with underlying emotional lability. Such complicated matrix of social and interpersonal circumstances has rendered this individual developmentally immature and arrested in a psychological state somewhere approximating that of preadolescence yielding an adult with an impoverished and ill-developed character organization. Mr. Lonchar views himself inferiorly holding extraordinarily low expectations for himself and then places in motion a set of circumstances within his life which allow him to live out just such a self-fulfilling prophecy.

Suicidal thinking and attempted suicide are common in patients who present with a psychiatric disorder such as that which afflicts Mr. Lonchar. There is historical evidence both in past and recent correctional records of mental health examiners expressing serious concern about this individual's potential for suicide predating the signing of his death warrant which supports and underscores the inherently chronic nature of his psychiatric illness. More profoundly, one may view Mr. Lonchar's request for an expedient execution not in the context of a reconciliation with the inevitable but instead by understanding them in the psychodynamic context of his habitual suicidal nature. In that context, his recent request to be executed should be viewed as a suicidal gesture driven not by rational thought process but by the distorted thinkings of a seriously mentally disturbed individual.

Further, I am of the opinion, within a reasonable degree of medical certainty, that there are clinical



findings at examination and historical evidence by review of his record which indicate that Mr. Lonchar may well have an underlying neurologic disorder consistent with traumatic brain damage that may be consistent with a diagnosis of Temporal Lobe Epilepsy. The dissociative trance-like "absence" state with a longstanding history of uncontrollable violent outbursts inconsistent with contextual circumstances may be clinically consistent with the highly complex pattern of neurological brain activity seen in patients with encephalographic evidence of temporal lobe dysfunction. As such, if I were seeing this individual in my private practice, I would seek neurological consultation complete with electroencephalographic recordings awake and asleep, computer assisted tomography scan and magnetic resonance imaging scan in order to satisfactorily rule out the presence of a potentially treatable organic brain disorder.

Mr. Lonchar clearly suffers from the additional complicating disability of grave and unfortunate life circumstances having been raised in a socio-cultural environment that was economically and emotionally impoverished, disruptive and chaotic, and encouraging of his social dysfunction in ways that further compound and detract from his already demonstrably impaired mental capacity. When an individual has serious mental impairment such as Bipolar Disorder (Manic Depression), potential brain damage as a result of a head trauma, a seizure disorder as a result of traumatic brain damage and/or congenital malformation, and a personality disorder as a result of significant developmental deprivation, expectations of normative behavior vis-a-vis the general population pales as a result of a substantially diminished mental capacity. Any of these clinical conditions, in and of themselves, are enough to raise the question of diminished mental capacity. Their appearance in concert with the life of Mr. Larry Grant Lonchar

is an orchestration of clinical evidence of extraordinary magnitude.

As a result of these conditions, Mr. Lonchar is not competent to waive his appeals.

If one does not understand the emotional and preeminently psychotic psychiatric conditions which Mr. Lonchar suffers from and were to see him as he generally presents for interview (emotionally labile, aloof, quiet, apparently indifferent) he might be easily viewed as someone who is devoid of concern, distant and disinterested; and as such viewed rather sociopathically. Frequently, examiners will diagnose an individual who presents in this fashion as erroneously having an antisocial personality disorder. It is my clinical opinion, that such a characterization and diagnosis in the face of the overwhelming clinical evidence present in this individual is totally without foundation and is inconsistent with his underlying severe mental disturbance, his predominantly schizoid and paranoid personality traits, and the potential significant effect of a neurologically impaired brain damaged state.

Based on the clinical data and descriptions contained herein, in the face of his substantial mental illness and diminished mental capacity, Mr. Lonchar does not have the capacity to make a knowing, intelligent and voluntary waiver of his right to appeal his impending sentence of death. Specifically, it is my opinion that as a result of his psychiatric illnesses and disorders, Mr. Lonchar does not have the capacity to appreciate his position and to make a rational choice with respect to continuing or abandoning further litigation, and that as a result of his mental disease he is necessarily substantially affected in his capacity to appreciate his position and to make rational choices regarding continuing or abandoning further litigation.

Moreover, it is my professional opinion, within a reasonable degree of medical certainty, that Mr. Larry Grant Lonchar suffered from a mental state at the time of his trial which rendered him mentally deficient and wholly incapable to fully understand the consequence of waiving his right to be present at trial, or to have made a knowing and intelligent voluntary waiver of his right to be present during critical periods of his court proceedings.

\* \* \* \*

Furthermore, I hold the opinion, within a reasonable degree of medical certainty, that Mr. Lonchar's inability to cooperate with counsel is not only clearly evident at present, but in retrospective review of his court proceedings, there is substantial evidence that raises a bona fide question regarding his competency at the time of trial and his ability to voluntarily make a knowingly and intelligent waiver of his constitutional rights.

(APP. A.)

Petitioner's sister and next friend, while not medically trained, can offer her own observations of Petitioner's current psychiatric turmoil, based upon her visits with her brother over the weekend. Her graphic description of her brother's affect provides singularly compelling support for Dr. Phillips' diagnosis, and, on its own, requires a stay of execution:

I visited Larry in prison on Saturday, March 17, 1990, along with several other members of my family. He did not seem able to look at any of us for long. He jerked his head around a lot, would stare in his lap and then at the ceiling. I noticed when he looked up his eyes seemed to be behaving strangely. He seemed to lose control of them for certain periods, with the eyeball walling up behind the lid. I do not think he was aware this was happening. It is something I have seen happen to him before, but not this intensely.

On Sunday, March 18, 1990, I visited Larry for much longer. He was much stranger even than the day before. Larry would alternate between different strange mannerisms. One moment, he would stare wide-eyed at nowhere, looking like he was going to bug out. The next moment he would stare off into space and not appear to be aware that anyone was present. When we would talk with him about why he was going to die, he would start talking about the NCAA finals, seemingly not realizing that he would not be here to see them.

Otherwise he would say what pain he was in, deep inside. There would be long periods of total silence. He is so depressed that he might have to watch his parents die before him, because he has always thought that they would get back together, and if they died he would have to face that this would never happen. This is a totally irrational thing with him, since our parents are both with other people, and have been for years. To see him wanting to die because of it is difficult to understand.

(App. C.) Based upon the compelling evidence of Petitioner's incompetency, this next friend petition must be entertained, and a stay of execution should enter.

### III. REASON FOR EXECUTION DATE— LARRY LONCHAR REQUESTED IT

The practice in capital cases in Georgia is *not* actively to pursue executions in cases in the posture of Petitioner's case. In capital cases, *if* an execution date is sought when certiorari is denied in the United States Supreme Court on direct appeal, upon the filing of a state habeas corpus petition the state does not oppose a stay of execution, a stay is entered, and the case is later set for hearing. Proof of claims, a full airing of claims, and amendments to include all claims then proceeds without the pendency of an execution, and without the time restraints attendant to execution dates.



This policy of staying executions has recently received the endorsement of the Powell Committee on Habeas Corpus Reform, the Judicial Conference of the United States, and the ABA Task Force on Habeas Corpus Reform. All who have examined the issue agree that first habeas corpus petitions should not proceed to determination of the issues under "pending execution" conditions.

However, because Mr. Lonchar is mentally ill he wrote to his sentencing judge and requested an execution date. Without any determination of Mr. Lonchar's competence, an execution date was set. The state to date has opposed a stay of execution. Now the specter arises of determining *competency* while an execution date is pending, the complete antithesis of the state's position heretofore in all capital cases, and a condition completely at odds with what the Powell Committee, the ABA, and the Judicial Conference have endorsed. A stay of execution is necessary initially properly and meaningfully to assess whether Larry Lonchar is capable of waiving his rights, and second to address the substantial issues regarding whether Petitioner's trial and sentencing proceedings were unconstitutionally conducted.

#### IV. ACTION BY COUNSEL JUSTIFYING A STAY OF EXECUTION

Undersigned counsel, Michael Mears, is a member of the Georgia Bar in private practice in Decatur, Georgia. When Larry Lonchar's execution date was set less than three weeks ago, the Georgia Resource Center asked Mr. Mears to consider representing Mr. Lonchar if Mr. Lonchar was not competent to waive his rights. Undersigned counsel agreed, quickly and necessarily superficially looked into the case, and promptly requested that the Superior Court of DeKalb County vacate the execution date because its setting violated due process. A hearing was scheduled on that motion, the motion was denied,

and shortly thereafter counsel appealed that decision to the Georgia Supreme Court.

Counsel then began to attempt to do that which the Powell Committee on Habeas Corpus Reform, the Federal Judicial Conference, and the American Bar Association Task Force on Habeas Corpus Reform *all* have decreed is virtually impossible—to investigate the competency of a client, to investigate the legality of that client's trial and sentencing proceeding, to prepare pleadings, and to prepare for evidentiary hearings and appeals, all under the pressure of an execution date, and all within a couple of weeks. This was counsel's reward for heeding the call of the bench and bar.

Nevertheless, undersigned counsel has been able to prepare and present serious allegations of the illegality of Larry Lonchar's conviction and sentencing proceedings, and has begun to investigate a variety of other issues. What is presented in this petition is more than sufficient to justify the issuance of a stay of execution under the normal procedure followed in this state.

#### V. FACTS OF THE OFFENSE

The case involves three deaths and two co-defendants. Both the judge and the prosecutor acknowledged, at various points during the co-defendants' proceedings, that it was unclear who did what. Mr. Lonchar was tried first and received death. The co-defendant, Wells, entered a plea in return for a life sentence two days after Petitioner was sentenced to death. Uncertainty about who was responsible for what at the crime scene was never resolved, as the following excerpts reveal:

"[T]here is some question in this case as to which person killed which individuals . . . so it is important to us to get to the jury on that [conspiracy] theory."

(R. 10, prosecutor speaking to judge).

"Who fired the first shots? . . . it is unclear. Unclear, but it doesn't matter."

(R. 1231, prosecutor closing argument).

THE COURT: Let me tell you what the Court's concern is. I know what Mr. Wells' contention is. I sat through one trial of this case. I don't know, I assume all of those deputies here did, too; I don't know. Anyway, given what the sentence was in the other case, I know what his contentions are, and I have got some doubts about, you know, who actually did what, based on a lot of what Dr. Burton's testimony was about what bullets did what to whom. Y'all heard the same evidence I did.

(R. 14, plea of co-defendant Wells after Petitioner's death sentence, Judge speaking to prosecutor).

Mr. Wells statement, Your Honor, that he abandoned the enterprise, obviously this Court should take that statement with a grain of salt. Obviously he is in a position where he is going to try to minimize his losses and try to lay the blame on Larry Lonchar.

(R. 50, plea of co-defendant Wells, prosecutor speaking to Court).

The testimony of the only eyewitness at Petitioner's trial was that Petitioner entered the residence and held two of the victims at gunpoint, telling the third victim that "you had nothing to do with it." (R. 765). While the victims were being held, Wells kicked the front door in, whereupon shots were immediately fired. (R. 766). Wells shot the eyewitness, and Wells was the *only* person shooting, as far as this witness could tell. *Id.* This witness identified *three* perpetrators, and could not say that Petitioner shot anyone.

## VI. CLAIMS FOR RELIEF

Each claim for relief raised below is predicated on the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as the Georgia Constitution and on other law set forth in the Petition.

### CLAIM I.

#### PETITIONER'S CONVICTION AND SENTENCE MUST BE REVERSED BECAUSE THE TRIAL JUDGE FAILED TO CONDUCT A COMPETENCY HEARING WHEN THE PROCEEDINGS RAISED A BONA FIDE ISSUE RESPECTING PETITIONER'S COMPETENCY, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

The claim is evidenced by the following facts:

1. All other allegations in this petition are incorporated into this claim by specific reference.
2. Petitioner was charged with three counts of murder, and the state intended to seek the death penalty. The jury, and all the parties, were aware of the seriousness of the charges and possible penalties.
3. The circumstances surrounding Petitioner's pre-trial, trial, and sentencing proceedings should have alerted the trial judge to the necessity of a competency determination. Petitioner was suicidal, a fact he made known to the trial judge repeatedly.<sup>2</sup> The judge knew, through dis-

<sup>2</sup> Jail records from the time of Petitioner's arrest through his trial reveal that Petitioner was constantly being seen by psychiatrists and other mental health professionals, and was constantly on suicide watch. He was in need of, but refused, medication. Because it is not known whether the judge was aware of this out-of-court indicator of incompetence, the jail medical logs are presented in Claim II—incompetency to stand trial—rather than here—denial of a competency hearing.



covery, that Petitioner's parole officer had sought psychiatric care for him immediately before the offense. The judge also knew that Petitioner did not trust and would not cooperate with his attorney, would not speak with his attorney, and wished to stay out of the courtroom. Discussions about staying out of the courtroom raised other indicia of incompetence, which the judge ignored. As will be shown, all these circumstances "raise[d] a reasonable ground to doubt defendant's competency," and the "trial court's failure . . . to make further inquiry into the accused's competence constituted a *Pate* [v. *Robinson*, 393 U.S. 375 (1966)] violation and denied [Petitioner] a fair trial." *Demos v. Johnson*, 835 F.2d 840, 844 (11th Cir. 1988); see also *Miller v. Dugger*, 838 F.2d 1530 (11th Cir. 1988).<sup>3</sup>

4. There were many things "suggesting incompetence which came to light during trial." *Morrow v. State*, 290 S.E.2d 137, 138 (Ga. 1982) (quoting *Drope*). First, by leaving the courtroom Petitioner severely prejudiced himself in the eyes of the jury, and prevented his attorney from providing effective assistance. So rear was that harm that the judge, the prosecutor, and defense counsel all strongly disagreed with Petitioner being absent, and tried to convince him to remain in court. The danger and harm—so obvious to the *rational* participants—was

<sup>3</sup> Georgia law requires competency to be determined by a jury. Code Ann. § 27-1502. Furthermore, in Georgia,

[W]hen evidence was presented indicating incompetency during the trial, there was a duty on the trial judge to inquire into the issue of competency and hold a hearing on the issue.

\* \* \*

The constitutional requirements of *Pate* and *Drope* continue throughout the criminal proceedings both prior to and during the main case itself . . . . [T]he actual issue of present incompetence must be addressed if there is evidence of incompetence which manifests itself during the proceedings.

*Baker v. State*, 250 Ga. 187, 297 S.E.2d 9, 12-13 (1982).

lost on Petitioner, a circumstance which, in and of itself, should have raised for the participants the issue of incompetency. But it was not just the Petitioner's irrational and plainly self-defeating desire to be absent which should have compelled a judicial competency determination. What the petitioner said purportedly to justify his absence revealed that he was patently unable to assist counsel, and that he had no rational or factual understanding of the proceedings or their consequences.

5. The following excerpts, among others, reveal the trial court's error. First, on February 27, 1987, defense counsel Leipold requested and received an ex parte in camera hearing with the trial judge, and explained his client's bizarre conduct:

(The following occurred in chambers:)

MR. LEIPOLD: I asked you to come in camera and I ask the record be sealed with reference to these matters.

THE COURT: I have already told my court reporter.

MR. LEIPOLD: First of all, I need to make a short record here:

I have been practicing for approximately 15 years. I was with the District Attorney's Office about six years. I have handled a number of criminal cases, as the Court is aware, a large number.

I have been in the posture where, until yesterday, *my client has declined to discuss this case with me, any of the facts surrounding this case.*<sup>4</sup> Now, until

<sup>4</sup> As we now know, Larry Lonchar's refusal was tied to his mental illness and resulting paranoia. See Affidavit of Dr. Phillips. Unknown to defense counsel, but certainly available to him, was the fact that Petitioner was on this day receiving psychiatric care and was on "suicide watch" in the county jail.

then, my position this morning was I was going to ask to come in, in camera, and ask you to appoint someone else or consider appointing someone else or allow me to withdraw, or do something, because—just to see if there was a problem in communication. That changed as of yesterday and I know [sic] longer make that motion. I am not asking to come out of the case. I am in the case and I will stay in the case.

But I am saying to you that because of that situation we are in a posture of where we are not overly prepared to respond to this situation. I have been in a position where, really, the only thing I have been able to find out about this case has come from the District Attorney. I may have to, for that reason, move for continuance and refer back to this particular conference, and if that happens I would ask the Court simply to note what I am saying here today. *I never had this happen before and I really don't know how to deal with it*, but that is the position that I am in, until yesterday, and yesterday was the first time that we have discussed the circumstances at all. Before then my client declined to discuss the matter with me.

THE COURT: Let me ask, is there some reason why you were not cooperating with your attorney?

MR. LEIPOLD: Wait. There is a reason, and I don't want him to respond to that. He has told me the reason. I don't feel it appropriate for him to tell you that reason. When this is over I will be glad to explain that but—

THE COURT: I was going to let him know that he has the right to have assistance of counsel.

MR. LEIPOLD: Right.

THE COURT: He has the right to have an attorney appointed, if he can't afford an attorney. He

does not have a right to choose what attorney that he is going to have to represent him.

MR. LEIPOLD: Let me amplify briefly, on the record. It is not a situation where Mr. Lonchar is saying that he does not like me, he does not want to talk with me or that we are having a personal dispute—and, Mr. Lonchar, the only response I'd like for you to make, if I am accurate, as to that, is that a yes or no to that?

MR. LONCHAR: (Defendant nods head up and down).

MR. LEIPOLD: Yes, was the response, that is not the reason.

THE COURT: And the other thing I want to let you know, you don't continue cases or don't get extensions of time by failing to cooperate.

MR. LEIPOLD: I need a psychiatrist, who is already working in this case, who we already used, who I'd like to continue to be able to employ. The public defender, frankly, assisted with some emergency funds that they had early-on in this case. I probably need, my estimate, something in the area of two thousand dollars. And that is a rough estimate. Okay?

(R. 1-6, February 27, 1987).<sup>5</sup> Four months later, with the trial about to start, the following occurred:

<sup>5</sup> Five days after this hearing, defense counsel's psychiatrist provided counsel with a report in which he opined that Mr. Lonchar was "currently" competent to stand trial. That evaluation was unconstitutionally and incompetently performed, and its results were unreliable. See Claim IV, *infra*; see also Affidavit of Dr. Phillips, Appendix A. In any event, even if Mr. Lonchar was "currently" competent, i.e., when last seen (December 11, 1986), his competence on February 27, 1987, and afterwards, was *not* addressed by the March 4, 1987 report, which did not even



MR. LEIPOLD: Now, *we have a matter that is a little bit different*. Mr. Lonchar has asked me to make a request of the Court, and he is quite serious about this. Mr. Lonchar does not wish to remain in court during the conduct of this trial. And in saying that Mr. Lonchar has advised me that he understands that there will be times when his presence will be required, when people are need to point him out or make an identification of him. He is an intelligent person. He has admitted to me at that point he knows that he will have to come into the courtroom. He has stated to me that he does not wish to remain in this court room during the trial of this case, that he wants to be removed during the trial of this case.

I have taken strong issue with that—that is all I will say at this point in time—and advised him to the contrary as to that. And *I really don't know what to say at this point, Your Honor*. That is his position. He does not want to participate or be present during the conduct of the trial. He can speak on that as well as I can at this point in time, if he want to address you.<sup>6</sup>

THE COURT: Let me hear from the prosecutor, what their position is.

MR. PETREY: Your Honor, we would like that he be here for the entirety of the voir dire and all preliminary matters such that. Jurors sometimes will recall instances of seeing that person, now that they have sat here. After such time as the case begins we would not be opposed to his absenting himself as

acknowledge Petitioner's "suicide watch" and psychiatric treatment while in jail.

<sup>6</sup> As is shown in Claim II, *infra*, the jail psychiatrist wanted to medicate Petitioner, but Petitioner refused. Counsel did not know that he was representing a mentally ill client who even the jail medical personnel believed was in need of medication.

long as the State would have the right to recall him to be present in the courtroom during such time as we feel his presence will be necessary. Obviously, there are many issues of identification.

THE COURT: If he doesn't want to be here during the trial—I assume he is going to be here during the voir dire when we have the voir dire selection?

MR. LEIPOLD: That is what he has advised me, Your Honor.

THE COURT: Well, Mr. Lonchar, let me ask you whether or not you have heard what your attorney had to say, is that correct?

MR. LONCHAR: Yes, sir.

THE COURT: Is there anything else that you want to add to that—

MR. LONCHAR: No, sir.

THE COURT: —as to your attorney's request?

How about the voir dire? I think he ought to be here for the voir dire, but I will be glad to hear from you about that.

MR. LEIPOLD: Let's be sure the record is clear, because of the way you just phrased that perhaps it is not clear. This is not his attorney's request, you—

THE COURT: I understand that.

MR. LEIPOLD: You said as to his attorney's request.

THE COURT: It could have been phrased—

MR. LEIPOLD: This is my client's position, it is not my request.

THE COURT: All right. You have discussed it with your client?

MR. LEIPOLD: I have.

THE COURT: Does he have any objection to being here during voir dire?

MR. LEIPOLD: We did not discuss that in detail. That would be during the questioning of the jury? He will remain during that.

MR. LONCHAR: If I have to.

MR. LEIPOLD: Yes.

THE COURT: I want him here for that. *I probably would go along with his request* so long as he understands there are certain parts of the case where he'd have to be here for the purpose of identification. If that is his request, it is contrary to your instructions, Mr. Leipold—I assume you have instructed him otherwise and he has made a decision about that.

Mr. Lonchar, do you understand your attorney is advising you not to remove yourself from the courtroom during the trial of the case? Did you understand that, Mr. Lonchar?

MR. LONCHAR: Yes, sir.

THE COURT: And you say that for your own reasons you want to remove yourself from the trial?

MR. LONCHAR: Yes, sir.

THE COURT: Well, I am going to ask that you all leave, the District Attorney's office, the prosecutor.

MR. PETREY: May I bring one thing to your attention before we leave? It concerns the Unified Appeal. We haven't found it yet. We are almost sure there is a statement that says the defendant shall be present during all stages. We will continue to look for that.

THE COURT: I will be glad to hear from you. He is doing to do the voir dire. What I am going

to do—he is going to do the voir dire and I will give you any chance—

MR. RICHTER: No need to worry about it right now.

THE COURT: I want you to be excused at this time, the prosecutors—the cameraman is not here. I assume it is not on. Had you rather do this in chambers? Would that be easier?

MR. LEIPOLD: Perhaps that will be best.

THE COURT: Let's adjourn to my chambers and bring Mr. Lonchar right through here and we will just set-up and do it in my chambers. Mr. Snead, you may be here, if you'd like.

We will be in recess for about 10 minutes.

(Whereupon, a recess was had at this point).

(REPORTER'S NOTE: The following occurred in chambers in the presence of the defendant, his counsel, deputy sheriffs and the court reporter)

THE COURT: All right. Mr. Lonchar, the Court is concerned about your request for the simple reason that I want you to understand everything that is going on. I want you to be able to advise and assist your attorney during this trial.

Mr. Leipold, why don't you explain to the Court the discussion that you have had with your client about this situation?

MR. LEIPOLD: Mr. Lonchar basically has advised me that he does not want to hear falsehoods told about him, that he doesn't want his family to have to go through this, that he doesn't want his family and the other people to go through this, that he doesn't want to be present in the courtroom while he hears false testimony given about him, that he would rather



remain absent from the courtroom during that period of time.

*I am most definitely not in agreement with this.*

MR. LONCHAR: As far as being present and assisting Mr. Leipold, I haven't assisted Mr. Leipold since he has taken this case. I have told him things, I have never told him the truth. Personally, I like the man, but personally I never trusted Mr. Leipold, for my own reasons. I have never told him what happened, so, how can he assist me, you know. We know the outcome of this trial, you know, so, you know.

MR. LEIPOLD: I might should inquire into the question about him not trusting me before we get on in this matter.

THE COURT: Do you want to explain that a little bit more, Mr. Lonchar, why you would not trust Mr. Leipold?

MR. LONCHAR: I have my reason. Nothing personal, just, you know—and I have never ever, you know—I have told him three or four different stories and I have never actually told him exactly what happened, and I have my reasons. Like I say—and, so, you know, there is no way they [sic] he can assist me, you know, by being present. I can't assist him because I haven't been assisting him.

MR. LEIPOLD: *We have some serious problems right here now with what has just been said. I mean, I don't even know what to go forward with now. I really don't know what Mr. Lonchar is saying at this point.*

THE COURT: Mr. Lonchar, do you want to explain to us—we have had numerous hearings in which I have asked you whether you had any complaint about your attorney. I have given you more than an

adequate amount of time to discuss all these things with your attorney. You have had a lot of evidentiary hearings, a lot of other proceedings. Now we are getting ready to go to trial and now you don't trust your attorney. Is there some reason why you are saying that?

In fact, we had one hearing in here, Mr. Leipold, he advised us then that you had just begun to tell him something. You know, that was—

MR. LEIPOLD: Are you saying, Larry, because I was a former DA, that you don't trust me? That is what you mentioned once before, that I, being a former District Attorney, and there might be a problem, is that what you mean?

MR. LONCHAR: Yes. That is part of it. But so far as Mr. Leipold, you know, as attorney, I have no objection, he is a very good attorney. But, you know, I do—you know, *I just want this over with, you know. Hell, we know the outcome of this, and we are playing all these games.* But I haven't, you know, I have never, you know, told Mr. Leipold.

MR. LEIPOLD: Would you tell me the truth at this point in time, Larry, in private?

MR. LONCHAR: No.

MR. LEIPOLD: Would you tell someone else the truth?

MR. LONCHAR: No.

THE COURT: Mr. Lonchar, all we can do is—and I don't mind saying this, I will say this on the record now, in my opinion, the attorney you now have is one of the best criminal attorneys that I have ever seen—

MR. LONCHAR: Sure.

THE COURT: —absolutely, no reason why you should—

MR. LONCHAR: No, I know.

THE COURT: —be—

MR. LONCHAR: I am not asking for another attorney.

THE COURT: I have seen his work in this case. I have seen his work in a lot of other cases. He has done everything that he can possible can for your benefit and for your assistance. Now, you know, if you choose not to tell him the things that help him, I don't know what I can do about that.

MR. LONCHAR: There is nothing. That is true.

THE COURT: *Well, I would implore you as best I can and as emphatically as I can, Mr. Lonchar, to tell Mr. Leipold what it is that you need to tell him. Whatever question that he asks you, to cooperate with him, and you are the only one. Apparently you have come to the conclusion that there is a forgone conclusion in this case. We haven't struck the jury yet and I don't understand why you have that attitude, and I would ask that you just do everything that you can to assist your attorney.*

MR. LEIPOLD: Is there anything else that you want to tell the Judge, Larry?

MR. LONCHAR: I just repeat the way that I feel, you know. *My presence is irrelevant.* And like I say, I haven't been assisting him and I am not going to start assisting him, and I am asking, you know, like I say, I realize at times I will have to be present. I realize that and I will cooperate. But as far as, you know—I have read that the law says once the jury is impaneled that I don't have to be present, you know. I don't want to cause a scene where you have to handcuff me and chain me to the seat and

gag me and all that. However, I feel, you know, if that is my only alternative, then I will, I mean, that is what I am asking, you know, to avoid all of this, you know. I know what is going to happen in this case and, you know, there is nothing I can do about it and—

THE COURT: You say you know what is going to happen in this case. Is there anything that you want to tell me about that? What do you think is going to happen in this case?

MR. LONCHAR: Well, there have been a lot of fabrications, you know.

THE COURT: Well, see—but that is the purpose of a trial, folks can—if you don't help your attorney, if you don't give him the ammunition, if you don't give him the assistance so that he can represent you, then how can you possibly expect that the result will be any different than what you have already decided in your mind it is going to be?

MR. LONCHAR: Well, it is just, you know—I mean, I am just being realistic and come on—you know, a jury will—I mean police officers say this, the jury is going to, you know, take my word that he is lying, you know?

THE COURT: It happens. Happened in my court before. The jury makes up their minds based upon the evidence. If you choose not to participate and to be aware you are damaging your case, I am sure.

MR. LONCHAR: I have no case, Your Honor, I have no case, you know, this—you know—

THE COURT: Well, all right. I am sorry you feel that way. But all I can do is advise you as to what your rights are and advice [sic] you what your alternatives are. It is your decision.

MR. LONCHAR: That's right.



THE COURT: If you chose [sic] not to assist your attorney and you chose not to be present, I will probably allow you to have that option.

MR. LONCHAR: Thank you.

THE COURT: Mr. Leipold, anything else that you want to say on the record?

MR. LEIPOLD: *I just think this is a mistake as far as the way to conduct the trial, and I advise Mr. Lonchar I think it is a serious mistake and I don't agree with his decision.*

THE COURT: Well, maybe he can reconsider. I will give him a chance to think about it. Obviously, I do want him during the voir dire which may take some period of time, and I once again ask him before—I will ask you, Mr. Lonchar, I will ask you to ask Mr. Leipold to advise me when you wish to be excused and at that point I will reconsider it and I will ask him to reconsider.

(R. 59-69) After voir dire, the following occurred:

MR. LEIPOLD: I speak now as an advocate for the position that I might think is the appropriate one, but, rather, my understanding of the Canons that I should convey the desire of my client to the Court, and my client has again reiterated this morning that he does not want to be present.

I have urged him to stay and urged him to change his mind on the things that he told the Court yesterday. There were matters that we discussed in camera that I think would justify the Court in acquiescing as far his desire to be out of the courtroom. I am not happy with it, I don't agree with it, but my understanding is that is his desire, unless he advises me otherwise. I have asked him that a short period of time ago.

THE COURT: Mr. Lonchar.

MR. LEIPOLD: Stand up.

THE COURT: You recall the discussion that we had yesterday morning, sir?

MR. LONCHAR: Yes, sir.

THE COURT: You will recall both the Court's request and your attorney's request that you remain in the courtroom, but that I told you that that was the decision that I would probably allow you to make. I wanted you to sit through the voir dire process and I wanted you to have an opportunity to reconsider that issue.

I am going to allow you, if you wish, to withdraw yourself during those parts of the trial that you think is—that you want to be excused from, if you wish to do so. I want to advise you, however, that, obviously, you would not be here, first of all, to assist your attorney in responding to questions and certainly you would not be here to evaluate what it is that your attorney does in your behalf. If you want to voluntarily give up those right that *you are, in fact, giving up a very valuable right that you have* and I am sure Mr. Leipold is going to do an excellent job, do the best possible job that he can do on your behalf, there is no question about that. There is, however, no question that *it is always better to have your client with you in court, both for strategic purposes and also for information purposes.* Mr. Lonchar do you understand what I am telling you?

MR. LONCHAR: Yes.

THE COURT: Now are you telling me that you still want to be absent from certain parts of the trial?

MR. LONCHAR: Yes, sir.

THE COURT: Do you understand that there may be certain parts of the trial which I will have to direct

that you be here, for identification and for certain other purposes, do you understand that?

MR. LONCHAR: Yes, sir.

THE COURT: All right, sir. I will at any time give you the opportunity to come back into Court whenever you wish to come back into Court and I will do whatever is necessary to facilitate your re-entry back into Court out of the presence of the jury. So, you can come back in whenever you'd like. Do you understand that, Mr. Lonchar?

MR. LONCHAR: Yes, sir.

THE COURT: Is there anything that you want to ask me about anything that is going on so far?

MR. LONCHAR: (No answer).

(R. 559-562). After the court heard from several witnesses, adjourned, and returned to court, the trial judge again advised Petitioner:

(The defendant was brought into the courtroom at this point)

THE COURT: Mr. Lonchar, there have been no witnesses presented yet [today]. I, once again, want to give you the opportunity to make yourself available and ask you to be present in court during these proceedings. I understand that you have talked with your attorney—

MR. LONCHAR: Yes, sir.

THE COURT: —and he has again asked you, also. And the court is not going to force you, it is not going to force you to sit here handcuffed to the chairs or anything like that, but I want to ask you, and tell you again, that things are going on, your case is proceeding. I will give you another opportunity to be here if you wish to be here.

THE DEFENDANT: No.

THE COURT: You don't wish to be here, Mr. Lonchar?

MR. LONCHAR: No.

THE COURT: Anything before we excuse Mr. Lonchar?

MR. RICHTER: No, sir.

THE COURT: I don't know that Buis has to identify him for any reason.

MR. RICHTER: No.

THE COURT: All right, Mr. Lonchar, you may be excused.

(The defendant was removed from the courtroom at this point)

(R. 1037-38). After Petitioner was convicted, he attempted to prevent the presentation of any evidence on his behalf at sentencing. The trial judge overrode this request, but even this prompted no inquiry into competency:

THE COURT: Mr. Lonchar, this is the part of the case where the jury gets to hear evidence, as I am sure you have discussed with your attorney, but I will make sure that you understand, the jury gets to hear evidence on the question of what is an appropriate punishment. I don't know whether you've had a chance to talk with your attorney about your presence during this part of the case.

Mr. Leipold, have you talked with him about that issue this morning?

MR. LEIPOLD: Yes, I have.

THE COURT: Have you—let me ask you, Mr. Lonchar, what is your request? Do you want to be here during this part of the case?



THE DEFENDANT: Yes, sir, I'd like to object to the way—if he is going to call some witnesses, and I have already stated I do not want no witness called on my behalf or anything in my behalf. I just like to be here, you know, if he does it against my wishes.

THE COURT: Well, do you want—do you want to have it held in my Chambers to discuss that? Mr. Leipold and Mr. Lonchar, do you want to have the hearing in the Chambers?

(The following occurred in Chambers with the above-mentioned individuals present)

THE COURT: Do you want to explain to me what it is that you are concerned about, about Mr. Leipold presenting witnesses, please?

MR. LONCHAR: Yes, Your Honor. This is my life, you know, I have made my decisions, you know, I have made it before the trial even started. I tied my attorney's hands. I have my reasons. And now he'd like to present my dad, he'd like to present, you know, other, you know, and I strongly object to it. This is my life and I am competent to, you know, decide, you know, who I want or who speaks in my behalf, and I—if I have, you know, I guess—this is my right, I would like nothing spoken on my behalf.

THE COURT: Well, you understand, I am sure that you do, Mr. Lonchar, I don't mean to make light of this, but do you understand the jury is going to decide whether or not to—

MR. LONCHAR: Sure. Yes, sir.

THE COURT: —to impose the death penalty in this case?

MR. LONCHAR: That's correct.

THE COURT: Mr. Leipold, have you had a chance to talk—

MR. LEIPOLD: *I am somewhat a loss here.* Mr. Lonchar has forbidden me to call his father as a witness in this case.

MR. LONCHAR: He is not my father. I could have had, you know, other family here, you know, friends. I, you know, I don't—if I wanted to defend, would have produced witnesses for the guilt or innocence trial part of the trial, you know. I tied your hands and I strongly object to anybody being called on my behalf.

MR. LEIPOLD: *The problem I have, of course, some ethical problem as to what do I do at this point in time, and I don't have the slightest idea.*

MR. LONCHAR: This is my life. I feel like I am competent to stand trial and competent to make my own decisions as far as, you know, who should be called.

THE COURT: Well, you know, I will let you make that decision as to guilt or innocence, I let you make that decision. This is a different situation now. Okay?

MR. LONCHAR: Yes.

THE COURT: I think to some extent the Court has a stake in making sure the jury gets the information that it needs to make a decision. And, Mr. Lonchar, for whatever reason that you have decided that you don't want to present any evidence, I am going to request, on behalf of the Court, that Mr. Leipold make some sort of presentation of whatever you think is appropriate under the circumstances. Whatever your reasons for feeling that way and whatever decision you have made about that is your decision. I want you to understand this jury has made the decision that you are guilty of three counts of malice murder. For the law to execute properly—I don't mean "execute" in the corporal, I mean—

MR. LONCHAR: Yes.

THE COURT: —for the law to go forward, this jury has to have information. Okay? And if you just decide to stand there and not present them anything, the jury won't have the information that it needs. Now, see, the State has the burden of proof in the guilt-innocence part of the trial to prove you are guilty. You could take the stand if you wanted to, and the State still has the burden.

But now we have a situation where the jury has found you guilty, so, now the question becomes what should the jury do. And that is a whole different ballgame.

MR. LONCHAR: Well, the State is going to present, you know, my past record, and they are going to—

THE COURT: You have got—and I will say this on the record, but not in front of a lot of folk—you probably have one of the better attorneys that I have ever seen operate in this court.

MR. LONCHAR: Right. I understand.

THE COURT: You ought to listen to him rather than making up your own mind. *You don't know what is going on. You are too involved in this case.* You are obviously the defendant. The whole purpose of our system is to get an advocate who can evaluate a case and make a decision and assist you. That is why the Constitution gives you a right to have an attorney. That is why Mr. Leipold has been there arguing every moment on your behalf, not because of what you want, but because of what our system requires. Okay?

MR. LONCHAR: Yes, sir.

THE COURT: And if you want to go and do one thing, that is your decision, but I am the Judge here

and I have got a system to protect and I have got a system to make sure it is fair. There is not just you involved. We have got those jurors in there who have to make a decision about a very, very important matter.

Mr. Leipold feels very strongly about your case. I know he has worked very hard on this case and has done a lot of things on your behalf, and I am telling you that, in my opinion—and I am going to ask him to present the people that he would have presented.

MR. LONCHAR: Well, like I say, that is the case, just my dad is here, you know, I could call my whole family here, my friends, you know, but, you know, so, just present one person here—

THE COURT: Because he is representative and probably is the most—I have gotten—you know, you could present, obviously, everyone who knows you, but the jury wants to get some flavor of the kind of person that you are, and a person who can speak on your behalf or can give some insight into the kind of person that you were, and kind of person that you are, that is important.

What else do you have?

MR. LEIPOLD: The only thing that I intended to produce was his father and also a letter that we'd like to offer as the reason for the absence of his mother, which I am sure the State will object to, but that is a matter to be taken up.

THE COURT: Is it the same letter that I got?

MR. LEIPOLD: Yes, sir. As a matter of fact, it is. You gave me a copy.

THE COURT: All right. I will probably allow that. I don't know. I will hear from them.



Mr. Lonchar, I am going to ask Mr. Leipold to make every argument that he can possibly make and I am going to ask him, you know, to try and present the evidence that he thinks is appropriate under the circumstances.

I don't know whether you want to testify or not, or whether you want to say anything to this jury or not. All the Court wants to do is make sure that down the road you don't have a change of heart and say, "I wish I had done something differently".

MR. LONCHAR: I won't.

THE COURT: "I wish I had done this". And I guarantee you there will come a time when you just kind of absent yourself from this part of the case, you are going to be sorry you did and, so, I am going to ask that you be in court during this part of it. I think that is important for the jury to see you and I think that it is important for you to be present. I have granted your request before.

MR. LONCHAR: That's correct.

THE COURT: And, Mr. Lonchar, whatever else goes on in this case you have got to understand that I am a human being and you are a human being, and there is a whole other realm beyond what goes on in court. Okay?

MR. LONCHAR: All right.

(R. 1341-1349).

6. The record reveals that the trial judge knew that Petitioner was suicidal, that he had asked police to kill him, and that he was asking for the death penalty. The trial judge knew that before the offense, Petitioner's parole officer was so concerned about him that she sought psychiatric help for him. He knew that Petitioner was not cooperating with counsel, was acting against his own best

interest, and was absent from the courtroom. He knew from the sentencing exhibits that Petitioner had received psychiatric treatment in prison. Under *Drope v. Mississippi*, 420 U.S. 162 (1975), the trial judge had an absolute obligation to conduct a competency determination, and the failure to have done so requires reversal *ipso facto*:

Even where a defendant is competent, at the commencement of his trial,<sup>7</sup> a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial. Whatever the relationship between mental illness and incompetence to stand trial, in this case the bearing of the former on the latter was sufficiently likely that, in light of the evidence of petitioner's behavior including his *suicide attempt*, and there being *no opportunity without his presence to evaluate that bearing in fact*, the correct course was to suspend the trial until such an evaluation could be made.

The question remains whether petitioner's due process rights would be adequately protected by remanding the case now for a psychiatric examination aimed at establishing whether petitioner was in fact competent to stand trial in 1969. Given the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances, see *Pate v. Robinson*, 383 U.S., at 386-387, 86 S.Ct. 836, 842-843, 15 L.Ed.2d 815; *Dusky v. United States*, 362 U.S., at 403, 80 S.Ct., at 789, we cannot conclude that such a procedure would be adequate here. Cf. *Conner v. Wingo*, 429 F.2d, at 639-640. The State

<sup>7</sup> There was no judicial determination of Petitioner's competency before the trial, at the start of trial, or during trial.

is free to retry Petitioner, assuming, of course, that, at the time of such trial he is competent to be tried.

*Drope*, 420 U.S. at 181, 183 (citations omitted). Suicidal behavior, absence from court, a history of psychiatric problems, and bizarre out-of and in-court actions similarly required a judicial competency determination here, and the failure to have made such a determination requires reversal.

### CLAIM II.

#### PETITIONER WAS TRIED AND SENTENCED TO DEATH WHILE INCOMPETENT, IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

This claim is evidenced by the following facts:

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. Regardless of whether Petitioner was in fact incompetent at trial and sentencing, if the circumstances at that time required an inquiry into competency, and that inquiry did not occur, retrial is necessary. In Claim I, *supra*, Petitioner demonstrated that a judicial determination of competency was required, given the circumstances known or reasonably knowable to the trial and sentencing judge, and that, on that basis alone, retrial is required. See *Drope v. Missouri*, 420 U.S. 162 (1975); *Demos v. Johnson*, 835 F.2d 840 (11th Cir. 1988); *Hance v. Zant*, 696 F.2d 940 (1983).

3. Even had circumstances suggesting Petitioner's incompetence *not* appeared of record to the trial judge, if Petitioner was in fact incompetent at trial and sentencing, his conviction and sentence violate the Sixth, Eighth, and Fourteenth Amendments. *Pate v. Robinson*, 383 U.S. 375 (1966). In this claim, Petitioner demonstrates that there is a bona fide doubt regarding Petitioner's competence at trial and sentencing.

4. The constitutional test for incompetency is articulated in *Dusky v. United States*, 362 U.S. 402 (1960):

[T]he "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."

*Id.* See also *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966); *Bishop v. United States*, 350 U.S. 961 (1956). Criteria usually examined to determine incompetency include any prior history of mental illness, unusual out-of-court actions, unusual in-court actions, self-defeating and counterproductive defendant actions, and current evaluations regarding consistency at the time of trial.<sup>8</sup> All these indicia reveal in this case that Petitioner was incompetent.

5. The record available from the trial raises a bona fide doubt as to competency. On June 8, 1987, the state provided defense counsel with some of Petitioner's statements. Included in the statements was Petitioner's parole officer's rendition of a conversation she had with Petitioner after the offense. According to the parole officer:

I told Larry that I know he had been depressed and that was why I had wanted him to go to Clayton Mental Health. I reminded him that he had an appointment scheduled for 10/15/86, two days after everything had happened.

(R. 206). Thus, immediately *before* the offense, a parole officer had recognized that Petitioner was in need of

<sup>8</sup> "Pate requires a *nunc pro tunc* competency hearing so long as a meaningful inquiry into the defendant's competency can still be made. *Zapata v. Estelle*, *supra*, 588 F.2d at 1020. If such an inquiry is no longer possible, the defendant must be retried, if found competent, or released. *Id.*" *Hance v. Zant*, 696 F.2d 940, 948 (11th Cir. 1983); see also *Fallada v. Dugger*, 819 F.2d 1564, 1567 (11th Cir. 1987).



mental health care. After the offense, the record shows that Petitioner was suicidal, he wanted police to kill him (R. 205), he wanted to get the death penalty (R. 237), he did not want evidence presented for him, he was paranoid about his attorney, he would not speak to his attorney, and he absented himself from the courtroom. See Claim I, *supra*.

6. Matters not contained in the record also raise a bona fide doubt as to Petitioner's competency. First, Petitioner has a documented history of mental illness. Records not obtained by defense counsel, but readily available then, reveal that Larry Lonchar has a history of mental illness dating back at least to age 13, that his mother and other members of his family suffer from mental illnesses, and that he had been treated for mental illness regularly. First, Dr. Phillips' report details mental illness in the family:

The children described their mother as a woman who "drank Coca-Cola all day long and ironed." They recall her buying cases of Coke and setting them next to the ironing board with a bottle opener. She used to open bottle after bottle, like a chain smoker would cigarettes. It was not until later years that the children came to realize that mother was washing a multitude of prescription pills down with the Cokes. It was not long thereafter that she had forgone the Cokes for liquor.

It was approximately during this time frame that Elsie Lonchar suffered her first psychotic decompensation and was admitted to the Battlecreek Sanatorium where she remained approximately 10 days and was discharged on (Mellaril). Upon her release she requested and obtained disability payments for psychiatric disability as well as the problem with her feet.

(App. A.)

7. Petitioner's history of psychiatric disorders is well documented:

The documented psychiatric records which have been provided to my office for review are incomplete, apparently due to the exigencies attendant to an execution being scheduled. They do, however, document Mr. Lonchar's difficult, violent and chaotic adolescence, his "unexplained" behavioral turn for the worse at about age 18, and his subsequent compulsive and uncontrollable behavior throughout the rest of his life.

While admitted for formal psychiatric treatment only once in his life, namely at age 15 when committed through the juvenile courts to the Plainwell Sanatorium, his life history is replete with episodes of truancy, disruptive behavior, and inappropriateness beginning at age 14 and continuing throughout his retention in juvenile facilities or prison with only brief interludes while placed on parole.

Multiple mental health examiners have pointed out Mr. Lonchar's need for intensive psychotherapy. He has frequently been described as both "very labile, nervous and having a high anxiety level." In 1970, a clinical psychologist reported that "Larry has no idea why he follows his impulses without logic or apparent reason." In 1978, another psychological examiner when formulating his clinical opinion of Larry stated, "emotional and physical abuse during formative years; needs intensive psychotherapy; very frightened and anxious; acts out very impulsively; it is very unlikely that he would callously harm others; immature, insecure, frightened, anxious, emotionally confused."

Despite the multiple notations and identifications of underlying psychopathology in this man, there have been few if any documented attempts to clinically

treat his underlying symptoms. According to record, Mr. Lonchar or his parole officer contacted the Clayton County Mental Health Center a few days prior to October 13, 1986, the date of the offense for which he is presently sentenced to death, and scheduled psychiatric treatment for him.

Throughout his incarceration before and during trial, medical personnel well documented Mr. Lonchar's psychiatric illness and need for psychiatric treatment. Although they expressed a desire to medicate him for his mental illness, he refused medication. Consequently, he was frequently placed on suicide watch because of the overt manifestations of his depression and the clinical indication as reported by jail mental health examiners that he was at a significant risk of self-harm as a result of his mental status.

(App. A.) The jail records to which Dr. Phillips refers are records kept while Petitioner was on trial for the cases leading to his current predicament. Those records are especially relevant to this claim, because they were kept during the time when it is contended Petitioner was competent.

8. The *jail* medical personnel knew that Mr. Lonchar was psychiatrically ill, they wished to medicate him for his mental illness, and they kept him on suicide watch throughout his incarceration. According to Doctor's Progress Notes, readily available to but not obtained by trial counsel, Petitioner was suicidal and under suicide watch constantly:

#### DOCTOR'S PROGRESS NOTES

- 10/31/86 Admitted to DeKalb County Jail
- 11/3/86 Inmate Lonchar is tearful, but co-operative. . . . He admits to seeing a psychiatrist when he was young . . . . He says he feels he has a split personality

- 12/11/86 Pt. seen for psychological assessment. He is very depressed and should be considered a high suicide risk
- 12/11/86 Place on suicide precaution
- 12/15/86 Evaluated by Dr. Pellingier; patient has suicide ideation
- 12/21/86 Insists on seeing psychiatrist because of his nerves
- 12/22/86 Evaluated by Dr. Pellingier, psychiatrist
- 12/22/86 Suicide precautions ordered
- 12/31/86 Inmate is depressed about his situation. States he was hospitalized in Michigan for his nerves some years ago . . . Will check back periodically (evaluation by Dr. Ermutlu)<sup>9</sup>
- 1/21/87 Still feels depressed and anxious . . . will be followed (evaluation by Dr. Ermutlu)
- 1/30/87 Inmate at first did not want to be seen (by Dr. Ermutlu), but eventually came in. He maintains his pessimistic attitude. Appears depressed but refuses to take any medicine . . . . wants no medical attention . . . . the staff should be cautioned to continue watching him (Dr. Ermutlu)
- 1/30/87 Capt. Bishop notified of suicide precautions
- 2/10/87 Complaining of bumps on shoulders, chest, arms, past month itching
- 2/12/87 Examined, hx neurodermatitis, multiple excoriations over chest and upper arms, neurodermatitis, Rx Hytome & Benadryl
- 5/13/87 I recommend that inmate Lonchar remain on suicide watch and refer him to the psychia-

<sup>9</sup> Defense counsel Leipold visited Petitioner two times during this period, on December 8 and November 5.



trist for evaluation for suicidal ideations.  
J. Canady

- 5/18/87 Scheduled to be seen [by Psychiatrist] but he is in Court today. Dr. Ermutlu
- 5/20/87 He is pessimistic, does not want to live. Sees no future for himself and does not even want his lawyer to defend him. Should be kept on suicide watch. (Dr. Ermutlu)
- 5/20/87 Tower #2 notified that Dr. Ermutlu continued the suicide watch
- 6/9/87 Sentenced to death . . . . he should be watched for a while yet

9. Thus, a documented history of mental illness, bizarre in-court and out-of court actions during the period in question, and contemporaneous with trial diagnosis of and treatment for mental illness, all point to incompetence. Current psychiatric evaluations do also. Dr. Phillips, after a thorough examination, concluded that Petitioner was incompetent to stand trial.

Specifically, and as will be elucidated in the following sections of this report, it is my professional opinion, to a reasonable degree of medical certainty, that Mr. Lonchar lacks the competence to decide whether or not to proceed with his appeals. *Furthermore, he was unable at trial to knowingly, intelligently, and voluntarily waive his right to be present, or any other constitutional right, he was, in fact, incompetent to stand trial, and his major mental illness prevented him from waiving rights pre-trial, including the right to silence.* Finally, it is my opinion that significant evidence in mitigation of punishment was available at trial and sentencing, had there been a proper evaluation of Mr. Lonchar.

The most challenging forensic question is whether or not Mr. Lonchar maintains both past and present the appropriate level of "competence" to cooperate effectively with counsel and to make important decisions in regard to his case. Mr. Lonchar does, as detailed in this report, suffer from the serious effects of significant psychiatric illness which frequently border on psychotic thought process further impaired by the effects of overt paranoia and obsessional self-destruction which substantively impair his capacity to make reasonable and knowingly voluntary decisions. During my clinical examination of Mr. Lonchar, we spent considerable time discussing his ability to trust and work cooperatively with his counsel. There was evident during that discussion the emergence of paranoid thinking with obsessionally self-destructive and suicidal thought process that borders on the psychotic and is unquestionably affecting his ability to cooperate with counsel.

Furthermore, I hold the opinion, within a reasonable degree of medical certainty, that Mr. Lonchar's inability to cooperate with counsel is not only clearly evident at present, but in retrospective review of his court proceedings, there is substantial evidence that raises a bona fide question regarding his competency at the time of trial and his ability to voluntarily make a knowingly and intelligent waiver of his constitutional rights.

#### *Summary:*

In my professional medical judgement, Mr. Larry Grant Lonchar, by virtue of the psychiatric diagnoses and opinions rendered herein, suffers from a diminished judgmental capacity that could be considered as mitigating the imposition of the ultimate penalty. Further, it is my opinion that his mental condition at the time of trial was such that he was both unable to cooperate with his counsel, to have

a rational and factual understanding of the proceedings, and unable both then and now to make a knowing, intelligent and voluntary waiver of his constitutional rights.

(App. A.)

10. Because petitioner was incompetent to stand trial, re-trial is required.

### CLAIM III.

ASSUMING THAT THE LAW ALLOWS A PERSON TO WAIVE HIS OR HER PRESENCE AT A CAPITAL TRIAL AND SENTENCING PROCEEDING, THE INQUIRY BY THE TRIAL JUDGE WAS INSUFFICIENT TO DEMONSTRATE A KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER OF THAT RIGHT BY PETITIONER, AND PETITIONER IN FACT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HIS RIGHT TO PRESENCE

This claim is evidenced by the following facts:

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. As Petitioner has consistently asserted, the right to be present when one is on trial for one's life is non-waivable, and thus any purported "waiver" made by Petitioner has no legal effect. *See, e.g., Proffitt v. Wainwright*, 685 F.2d 1227, 1257-58 (11th Cir. 1982); *Hall v. Wainwright*, 733 F.2d 766 (11th Cir. 1984); *In re United States of America*, 784 F.2d 1062 (11th Cir. 1986).

3. When Petitioner raised this issue on direct appeal, the Georgia Supreme Court allowed such a "waiver", and concluded that Petitioner understood his rights and the dangers of leaving, "or should have, because the court so advised him." However, because of Petitioner's mental

illness it is abundantly clear that he in fact did not knowingly, voluntarily, and intelligently waive his right to presence, and had the trial court or trial counsel acted properly vis-a-vis Petitioner's bona fide issue of incompetency, the result in this case would have been different.

4. If there were the potential for an effective waiver of the right, the issue of "waiver of presence" would be somewhat tied to the issue of competency, and *Drope* is instructive;

Our resolution of the first issue raised by petitioner makes it unnecessary to decide whether, as he contends, it was constitutionally impermissible to conduct the remainder of his trial on a capital offense in his enforced absence from a self-inflicted wound. *See Diaz v. United States*, 223 U.S. 442, 445, 32 S.Ct. 250, 251, 56 L.Ed. 500 (1912). However, even assuming the right to be present was one that could be waived, what we have already said makes it clear that there was an insufficient inquiry to afford a basis for deciding the issue of waiver.

*Drope v. Missouri*, 420 U.S. at 182.

4. Dr. Phillips' expert opinion is that Petitioner did not knowingly and intelligently waive his right to be present at trial:

The above constellation of clinical and historical findings lead me to believe, within a reasonable degree of medical certainty, that Mr. Larry Grant Lonchar, due to his psychiatric illness, has a diminished mental and emotional capacity which would be considered a significant deviation from the capacity held by a person of normal average mental ability and character organization. Additionally, I am of the opinion, within a reasonable degree of medical certainty, that at the time of the offense, and at varying points throughout the adjudicatory process both past and present, that Mr. Lonchar's actions



and behaviors were effected by the mental health impairments discussed in this report.

If one does not understand the emotional and preeminently psychotic psychiatric conditions which Mr. Lonchar suffers from and were to see him as he generally presents for interview (emotionally labile, aloof, quiet, apparently indifferent) he might be easily viewed as someone who is devoid of concern, distant and disinterested; and as such viewed rather sociopathically. Frequently, examiners will diagnose an individual who presents in this fashion as erroneously having an antisocial personality disorder. It is my clinical opinion, that such a characterization and diagnosis in the face of the overwhelming clinical evidence present in this individual is totally without foundation and is inconsistent with his underlying severe mental disturbance, his predominantly schizoid and paranoid personality traits, and the potential significant effect of a neurologically impaired brain damaged state.

Based on the clinical data and descriptions contained herein, in the face of his substantial mental illness and diminished mental capacity, Mr. Lonchar does not have the capacity to make a knowing, intelligent and voluntary waiver of his right to appeal his impending sentence of death. Specifically, it is my opinion that as a result of his psychiatric illnesses and disorders, Mr. Lonchar does not have the capacity to appreciate his position and to make a rational choice with respect to continuing or abandoning further litigation, and that as a result of his mental disease he is necessarily substantially affected in his capacity to appreciate his position and to make rational choices regarding continuing or abandoning further litigation.

Moreover, it is my professional opinion, within a reasonable degree of medical certainty, that Mr. Larry Grant Lonchar suffered from a mental state at the time of his trial which rendered him mentally deficient and wholly incapable to fully understand the consequences of waiving his right to be present at trial, or to have made a knowing and intelligent voluntary waiver of his right to be present during critical periods of his court proceedings.

(App. A.)

5. Because Petitioner did not knowingly and intelligently waive his right to presence, retrial is required.

#### CLAIM IV

**DEFENSE COUNSEL UNREASONABLY AND PREJUDICIALLY FAILED PROPERLY TO INVESTIGATE AND PRESENT HIS CLIENT'S BACKGROUND AND MENTAL STATE, WITH THE RESULT THAT EVIDENCE OF INSANITY, INCOMPETENCY, INVALID WAIVERS OF CONSTITUTIONAL RIGHTS, AND COMPELLING EVIDENCE IN MITIGATION OF PUNISHMENT WAS NOT PRESENTED, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS**

This claim is evidenced by the following facts:

1. All other allegation in this petition are incorporated into this claim by specific reference.
2. Defense counsel was repeatedly put on notice that Larry Lonchar's mental condition was, or should have been, a significant factor in his trial and sentencing. Counsel did have Larry Lonchar "evaluated" (incompetently) seven months before trial and sentencing, but 1.) he neither gathered nor provided any background information to the evaluator, information that was criti-

cal for a proper diagnosis; 2.) that evaluation was per se insufficient, based as it was primarily on a simple mental status exam and upon an incomplete and invalid psychological assessment; 3.) that evaluation occurred seven months or more before trial, and no further evaluation occurred, 4.) the evaluation did not address mitigating circumstances, or ability to waive constitutional rights, and 5.) neither the defense attorney nor his "psychiatrist" knew then about the documented jail-house mental health problems, about the parole officer's concern pre-offense about Larry Lonchar's psychiatric condition, or that previous prison records revealed and documented Larry Lonchar's psychiatric disorders. Because of trial counsel's inadequate preparation and performance, Petitioner's right to effective assistance of counsel and to competent mental health evaluation was violated.

3. After this singularly inadequate evaluation was conducted, counsel learned: a.) that his client did not trust him, had not cooperated with him, and intended to act in manner that was not in his best interest; b.) that his client would and did refuse to attend his own trial; c.) that his client had received psychiatric treatment in the past, d.) that petitioner's natural mother was mentally ill, and had been for most of Petitioner's life, and that Petitioner did not believe that his natural father was in fact his father. Counsel also knew that after the offense his client "[w]as white as a sheet, his eyes were big around, sticking out of his head," (R. 908) that when he was arrested he exhorted the arresting officer to "Go ahead and shoot me. Shoot me," and "Go ahead and kill me, kill me." (R.1002). He knew that when his client was interrogated, he told the police "he was going to plead guilty and die in the chair," he was "very upset," and "he began shaking and trembling." (R. 1061, 1075).

4. Counsel also knew, or should have known, that Petitioner's parole officer immediately before the offense recognized that Petitioner was in need of mental health intervention, and scheduled such treatment. The offense

occurred two days before the scheduled appointment (R. 206). Counsel never knew, however, about the county jail's desire to medicate Petitioner for his psychiatric disorder, and Petitioner's refusal to be medicated.

5. With the new information he *did* have, counsel was obligated to ensure that Petitioner was properly evaluated. Counsel was obligated *ab initio* to ensure that a competent mental health evaluation occurred, but certainly by the time of trial and/or sentencing counsel should have known that the issue had to be addressed again, and *properly*. Counsel failed to address the issue, to his client's clear prejudice.

6. As an indigent whose mental status was at issue during all phases of his trial and capital sentencing proceeding, Mr. Lonchar was entitled to a competently conducted psychiatric evaluation. *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Ake* deals with the state's obligation in a criminal case "to assure that the defendant has a fair opportunity to present his defense." In *Ake*, the Supreme Court held that "the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition," when the defendant's mental health is at issue. *Id.* at 70. The Court, after discussing the potential help that might be provided by a psychiatrist, stated:

We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, *assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense*. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant



have access to a *competent psychiatrist* for the purpose we have discussed, and as in the case of the provision of counsel we leave to the states the decision on how to implement this right.

*Id.* at 83 (emphasis added). This holding recognized the entitlement of an indigent defendant, not only to a "competent" psychiatrist (i.e., one who is duly qualified to practice psychiatry), but also to a psychiatrist who performs competently, that is, one who conducts a professionally competent examination of the defendant and who on this basis provides professionally competent assistance.

7. Due process requires the state to make available mental health experts for indigent defendants, because "the potential accuracy of the jury's determination is . . . dramatically enhanced" by providing indigent defendants with competent psychiatric assistance. *Id.* at 81-83. In this context, the Court clearly contemplated that the right of "access to a competent psychiatrist who will conduct an appropriate examination," would include access to a psychiatrist who would conduct a professionally competent examination. To conclude otherwise would make the right of "access to a competent psychiatrist" an empty exercise in formalism.

8. In *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985), the court recognized that the defendant's right to effective assistance of counsel was impaired by the State's withholding of evidence "highly relevant, or psychiatrically significant, on the question of [defendant's] sanity" from the psychiatrist who was ordered to evaluate the defendant's sanity. 758 F.2d at 532. Even though that evidence was disclosed to the psychiatrist on the witness stand at trial, "[o]bviously, he was reluctant to give an opinion when confronted with this information for the first time on the witness stand. . . . This was hardly an adequate substitute for a psychiatric opinion developed in such a manner and at such a time as to allow counsel a reason-

able opportunity to use the psychiatrist's analysis in the preparation and conduct of the defense." *Id.* at 532 n.10, 533.<sup>10</sup>

9. Similarly, in *Mason v. State*, 489 So.2d 734 (Fla. 1936), the Florida Supreme Court recognized that the due process clause entitles an indigent defendant not just to mental health evaluation, but also to a professionally valid evaluation. Because the psychiatrists who evaluated Mr. Mason pre-trial did not know about his "extensive history of mental retardation, drug abuse and psychotic behavior," or his history "indicative of organic brain damage," and because the court recognized that the evaluations of Mr. Mason's mental status would be flawed if the physicians had "neglect[ed] a history" such as this, the court remanded Mr. Mason's case for an evidentiary hearing. *Id.* at 735-37.

10. Courts have recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel. The due process clause requires that appointed psychiatrists render that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances. In psychiatry, as in other medical specialties, the standard of care is the national standard of care recog-

<sup>10</sup> Although the *Blake* court analyzed the impairment of the psychiatrist's ability to conduct a professionally adequate evaluation in terms of its impact on the right to effective assistance of counsel, it recognized that its analysis was "fully supported" by *Ake*. In support of this conclusion, the court gave emphasis to *Ake*'s requirement that "the state must at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and in presentation of the defense." 758 F.2d at 530-31 (quoting *Ake*, 470 U.S. at 83). Thus, *Blake* recognized that if an appointed psychiatrist's ability to "conduct an appropriate examination" is impaired, because of counsel's or the State's actions, due process is violated.

nized among similar specialists, rather than a local, community-based standard of care. We will show that had counsel or his chosen evaluators seven months before trial and through the time of sentencing acted competently, the result in this case would have been different.

A. *The Proper Standard of Care Involves a Five Step Process Before Diagnosis*

In the context of diagnosis, exercise of the proper level of care, skill and treatment requires adherence to the procedures that are deemed necessary to render an accurate diagnosis. On the basis of generally-agreed upon principles, the standard of care for both general psychiatric and forensic psychiatric examination reflects the need for a careful assessment of medical and organic factors contributing to or causing psychiatric or psychological dysfunction. H. Kaplan & B. Sadock, *Comprehensive Textbook of Psychiatry* 543 (4th ed. 1985). The recognized method of assessment, therefore, must include the following steps.

1. *An accurate medical and social history must be obtained*

Because "[i]t is often only from the details in the history that organic disease may be accurately differentiated from functional disorders or from atypical lifelong patterns of behavior," R. Strub & F. Black, *Organic Brain Syndromes* 42 (1981), an accurate and complete medical and social history has often been called the "single most valuable element to help the clinician reach an accurate diagnosis." Kaplan & Sadock at 837.

2. *Historical data must be obtained not only from the patient, but from sources independent of the patient*

It is well recognized that the patient is often an unreliable and incomplete data source for his own medical

and social history. "The past personal history is somewhat distorted by the patient's memory of events and by knowledge that the patient obtained from family members." Kaplan & Sadock at 488. Accordingly, "retrospective falsification, in which the patient changes the reporting of past event or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." *Id.* Because of this phenomenon,

[I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 Va. L. Rev. 427 (1980). Accord Kaplan & Sadock at 550; American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," *Issues in Forensic Psychiatry* 202 (1984); Pollack, *Psychiatric Consultation for the Court*, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1974); H. Davison, *Forensic Psychiatry* 38-39 (2d ed. 1965).

3. *A thorough physical examination (including neurological examination) must be conducted*

See, e.g., Kaplan & Sadock at 544, 837-38 & 964. Although psychiatrists may choose to have other physicians conduct the physical examination, psychiatrists



[s]till should be expected to obtain detailed medical history and to use fully their visual, auditory and olfactory senses. Loss of skill in palpation, percussion, and auscultation may be justified, but loss of skill in observation cannot be. If the detection of nonverbal psychological cues is a cardinal part of the psychiatrists' function, the detection of indications of somatic illness, subtle as well as striking, should also be part of their function.

Kaplan & Sadock at 544. In further describing the psychiatrist's duty to observe the patient s/he is evaluating, Kaplan and Sadock note in particular that "[t]he patient's face and head should be scanned for evidence of disease. . . . [W]eakness of one side of the face, as manifested in speaking, smiling, and grimacing, may be the result of focal dysfunction of the contralateral cerebral hemisphere." *Id.* at 545-46.

4. *Appropriate diagnostic studies must be undertaken in light of the history and physical examination*

The psychiatric profession recognizes that psychological tests, CT scans, electroencephalograms, and other diagnostic procedures may be critical to determining the presence or absence of organic damage. In cases where a thorough history and neurological examination still leave doubt as to whether psychiatric dysfunction is organic in origin, psychological testing is clearly necessary. See Kaplan & Sadock at 547-48; Pollack at 273. Moreover, among the available diagnostic instruments for detecting organic disorders, neuropsychological test batteries have proven to be critical, as they are to be valid and reliable diagnostic instruments available. See Filskov & Goldstein, *Diagnostic Validity of the Halstead-Reitan Neuropsychological Battery*, 42 J. of Consulting & Clinical Psych. 382 (1974); Schreiber, Goldman, Kleinman, Goldfader, & Snow, *The Relationship Between Independent Neuropsychological and Neurological Detection and Localization of Cerebral Impairment*, 162 J. of Nervous and Mental Disease 360 (1976).

*chological and Neurological Detection and Localization of Cerebral Impairment*, 162 J. of Nervous and Mental Disease 360 (1976).

5. *The standard mental status examination cannot be relied upon in isolation as a diagnostic tool in assessing the presence or absence of organic impairment*

As Kaplan and Sadock have explained, "[C]ognitive loss is generally and correctly conceded to be the hallmark of organic disease," and such loss can be characterized as "(1) impairment of orientations; (2) impairment of memory; (3) impairment of all intellectual functions, such as comprehension, calculation, knowledge, and learning; and (4) impairment of judgment." *Id.* at 835. While the standard mental status examination (MSE) is generally used to detect and measure cognitive loss, the standard MSE—in isolation from other evaluative procedures—has proved to be very unreliable in detecting cognitive loss associated with organic impairment. Kaplan and Sadock have explained why:

When cognitive impairment is of such magnitude that it can be identified with certainty by a brief MSE, the competent psychiatrist should not have required the MSE for its detection. When cognitive loss is so mild or circumscribed that an exhaustive MSE is required for its recognition then it is likely that it could have been detected more effectively and efficiently by the psychiatrist's paying attention to other aspects of the psychiatric interview.

In order to detect cognitive loss of small degree early in its course, the psychiatrist must learn to attend more to the style of the patient's communication than to its substance. In interviews, these patients often demonstrate a lack of exactness and clarity in their descriptions, some degree of circumstantiality, a tendency to perseverate, word-finding

problems or occasional paraphasia, a paucity of exact detail about recent circumstances and events (and often a lack of concern about these limitations), or sometimes an excessive concern with petty detail, manifested by keeping lists or committing everything to paper. The standard MSE may reveal few if any abnormalities in these instances, although abnormalities will usually be uncovered with the lengthy MSE protocols.

The standard MSE is not, therefore, a very sensitive device for detecting incipient organic problems, and the psychiatrist must listen carefully for different cues.

*Id.* at 835. Accordingly, "[c]ognitive impairment, as revealed through the MSE, should never be considered in isolation, but always should be weighed in the context of the patient's overall clinical presentation—past history, present illness, lengthy psychiatric interview, and detailed observations of behavior. It is only in such a complex context that a reasonable decision can be made as to whether the cognitive impairment revealed by MSE should be ascribed to a organic disorder or not." *Id.* at 836.

In sum, the standard of care within the psychiatric profession which must be exercised in order to diagnose is most concisely stated in Arieti's *American Handbook of Psychiatry*:

Before describing the psychiatric examination itself, we wish to emphasize the importance of placing it within a comprehensive examination of the whole patient. This should include a careful history of the patient's physical health together with a physical examination and all indicated laboratory test. The interrelationships of psychiatric disorders and physical ones are often subtle and easily overlooked. Each type of disorder may mimic or conceal one of the other type. . . . A large number of brain tumors and

other diseases of the brain may present as "obvious" psychiatric syndromes and their proper treatment may be overlooked in the absence of careful assessment of the patient leading him to the diagnosis of physical illness. Indeed, patients with psychiatric disorders often deny the presence of major physical illnesses that other persons would have complained about and sought treatment for much earlier.

*Id.* at 1161.

B. *Had Petitioner Received A Competent And Reliable Mental Health Evaluation Based Upon A Proper Standard of Care, There Is A Reasonable Probability That The Result In This Case Would Have Been Different*

1. Social and Medical History
2. Historical Date, Independent From Client

Defense counsel provided no or grossly insufficient background information to the examiner, especially evidence independently gathered. The appendix is replete with evidence that could have been found, some of which will be detailed here.

a. *Petitioner's Tragic Upbringing*

As Dr. Phillips' report details, and as supported by the affidavits of family members, Petitioner's upbringing was a frightening and dangerous experience. His home situation was marked by violent, lurid, drunken, and insane battles between parents, and by abandonment, neglect, abuse, and deprivation. Dr. Phillips' report provides an encapsulation of the horror:

The strain of Chooch's [Petitioner's brother's] poor health on parents Elsie and Milan was immense. Milan was working as a brakeman on the Battle-creek/Chicago line and started staying out nights to



drink and gamble with other railroad workers. Milan's drunkenness was accompanied by what has been described as "uncontrollable and violent rages." During those early years of marriage before the children, if Elsie was present she received the brunt of the violence. If she wasn't present, furniture and kitchen utensils served to absorb the anger. It was during this period that Elsie began disassociating herself from family and home, learning to be both physically and emotionally distant as possible from family life.

The children described their mother as a woman who "drank Coca-Cola all day long and ironed." They recall her buying cases of Coke and settling them next to the ironing board with a bottle opener. She used to open bottle after bottle, like a chain smoker would cigarettes. It was not until later years that the children came to realize that mother was washing a multitude of prescription pills down with the Cokes. It was not long thereafter that she had foregone the Cokes for liquor.

The children knew their father was a drinker even in the early years because when their father was home in Battlecreek, they were constantly being sent to fetch him home from one of the neighborhood taverns down the street. If the children failed to recover their dad, mother would do the task. Larry recalls his mother's usual success in getting his father home. After a while, however, she started going up to the tavern and staying. By the end of the day, the children would go up to the tavern to find both parents and grandparents drunk.

Mr. Lonchar and his sibling remember innumerable occasions when their father became violent after drinking. Initially, most of the father's violence was directed more at their grandmother Victoria—usually when both had been drinking. It was not uncommon for the arguments to escalate from verbal altercations to physical violence necessitating the children calling the police. Such a scenario was a regular occurrence at the Lonchar household with the police being called initially because of fights between the father and grandmother and subsequently the husband and his wife.

When his father drank as stated above, he tended to beat his wife more than anyone else in the family. Larry remembers several occasions night after night in which the children were awakened from their sleep in the basement to the sounds of angry and fearful screaming. Invariably, they would run upstairs only to find their father holding their mother by the hair and punching her in the face with his fists over and over. The children, Tiny in particular, would ultimately decide whether or not to call the police. That equation was driven by a decision according to whether or not they thought their father would pass out before he might happen to kill his wife.

Larry graduated from grammar school and entered South Eastern Junior High School as a seventh grader in 1965. As he grew older, his mother reports that he began to have "the most incredible temper tantrums you've ever seen." She also reported noting his "eyes rolling back in his head." She always attached the episodes of eye movements to Larry's temper tantrums. She also recalls that on one occasion he hit her during one of these tantrums.

Several days later she brought it to his attention and he responded as if she were joking. She could hardly convince him that he had actually hit her and to this day believes Larry was not aware of his actions at that time.

During mid-year of the eighth grade, Larry was expelled from school for calling one of his teachers "you old bitch" after she made him leave her classroom. Larry was sent to juvenile court, adjudicated delinquent and was committed to Marshall Juvenile Home in Marshall, Michigan. It was approximately during this time frame that Elsie Lonchar suffered her first psychotic decompensation and was admitted to the Battlecreek Sanatorium where she remained approximately 10 days and was discharged on (Mellaril). Upon her release she requested and obtained disability payments for psychiatric disability as well as the problem with her feet.

Shortly thereafter she divorced her husband and took custody of all four children. Although her husband was ordered by the court to pay child care payments of \$50.00 per week per child, he did not make a single payment and as such she raised her children on welfare.

The divorce was apparently a crushing blow for Larry. It was years before he accepted the material fact that his parents were divorced, and he has never fully given up on his desire to see them reunited. Even when he was an adult in prison, he would write his mother asking her when she would reunite with his father.

(App. A.)

Had counsel properly looked into petitioner's prior incarceration records, he would have discovered documented state recognition of Petitioner's mental illness. Those rec-

ords document Larry's difficult, violent, and chaotic adolescence, his "unexplained" psychiatric turn at about age 14, and his subsequent impulsive behavior throughout the rest of his life.

As already discussed, but here, as revealed in records, Larry was born September 3, 1951, in Battle Creek, Michigan. He lived with his parents, grandparents, and siblings in a small brick house in an inter-racial neighborhood. His mother was and is mentally ill, and has taken psychotropic medication for years by prescription. His father was and is an alcoholic. He abused Larry and his mother, psychologically and physically, while Larry was growing up. See 4/20/71 Report; 4/21/78 Report, App. E.

Larry was nevertheless an above average student until the eighth grade. "Then, *very suddenly*, [he] began to have serious problems." Rapport, 1/1/76, p. 5, App. E. Truancy, disruptive behavior, inappropriate behavior, and criminal behavior followed. Starting at age 14-16, he spent the rest of his life in either juvenile facilities or prison, with brief interludes on parole, usually with his mentally ill mother. According to his mother, according to defense attorney records (not followed up on), and according to prison records, Larry was committed to a "sanitarium" at age 15 (see 12/24/69 Report, "BTS 1966") and was constantly in and out of juvenile facilities thereafter.

Because of a series of offenses in 1969, Larry was arrested as an adult. His mother advised that he was in need of psychiatric treatment. He was evaluated by Dr. Myron A. Tazelaar, M.D., with reference to sentencing alternatives and based on that evaluation, the probation agent concluded that: In view of his [Dr. Tazelaar's] remarks and all of the other factors taken into consideration . . . . I do not feel at the present there is anything that we have to offer" other than jail, "so that Larry can be protected from himself . . . ." Report 12/17/69, App. A. Other reports show:



- 1/12/70 clinical psychologist's test results—Larry "has no idea as to why he follows his impulses without logic or apparent reason"
- 4/28/71 Mrs. Lonchar suffers from nerves and other ailments and takes tranquilizers in rather large quantities
- 1/21/76 "rap sheet"; dad was strict disciplinarian, spankings
- 5/28/75 psychoneurotic symptoms; plagued with feelings of insecurity and inadequacy grossly disproportionate to his realistic situation; impulsive, dangerous, highly instable, homicidal; needs intensive psychotherapy
- 7/9/76 multiple offender who has demonstrated impulsive and erratic behavior
- 4/20/78 very nervous; high anxiety level
- 4/21/78 father was an abusive drinker, and beat upon defendant's mother as well as the defendant and siblings; "Therefore, at . . . . age 13, . . . . [he] began to escape to the streets."; free floating anxiety and raw nerves; a pattern of dealing with a hated self by periods of frenzied activity; totally bewildered and sick at heart; tragic nature of self-destruction pattern
- 5/31/78 "emotional and physical abuse during formative years; needs extensive psychotherapy;" very frightened and anxious; acts out very impulsively; "it is very unlikely that he would callously harm others; immature, insecure, frightened, anxious, emotionally confused.
- 4/8/84 paroled shortly after this

(App. E.) Finally, as already discussed in Claim III, *supra*, jail records maintained before and during trial reveal that jail personnel believed Petitioner was psychiatrically

ill, they wished to medicate him, and he was constantly placed on suicide watch. (App. F.)

### 3. Proper Physical And Neurological Exam

Dr. Phillips conducted a physical and neurological examination of Petitioner, resulting in the discovery of evidence of neurological brain damage. As his report reveals:

Finally, I am of the opinion, within a reasonable degree of medical certainty, that there exists both supportive clinical and historical evidence at the time of my examination, making the indications rather high that Mr. Lonchar has underlying brain damage as manifested by abnormal pupillary dilation, bilateral single beat nystagmus, in the face of historical evidence of significant head trauma and possible seizure disorder. Such brain damage would further substantially contribute to rendering this individual less effective in meeting the standards expected for his age.

(App. A.)

### 4. Proper Diagnostic Studies

### 5. Mental Status Exam

While Mr. Lonchar was briefly examined by a psychologist seven months before trial, that psychologist himself acknowledged that he gave few tests to Petitioner, and that those few were mostly invalid. Mr. Lonchar was also briefly evaluated by a psychiatrist seven months before trial, who conducted a mental status exam.

Had Petitioner's counsel conducted a background investigation, documented Petitioner's history of mental illness and his mental illness in jail, and had proper physical, neurological, and diagnostic exams been performed rather than relying almost exclusively upon a mental status exam, there is a reasonable probability that the result in this case would have been different. Incompetency and invalid

waivers have already been discussed in Claims II and III, *supra*. In addition, compelling evidence in mitigation of punishment would have resulted. Defense counsel presented evidence only from the defendant's father at trial, because he had conducted not investigation. The family members whose affidavits appear at Appendix B-D would gladly have talked to trial counsel and been available at sentencing, and all the records discussed above were available. Counsel unreasonably failed to develop this information.

When counsel unreasonably fails to properly investigate competency, *Speady v. Wyrick*, 702 F.2d 723 (8th Cir. 1983); *Adams v. Wainwright*, 764 F.2d 1356 (11th Cir. 1985); *United States v. Edwards*, 488 F.2d 1154 (5th Cir. 1974), insanity and diminished capacity, *Beavers v. Balkcom*, 636 F.2d 114 (5th Cir. 1981); *Davis v. Alabama*, 596 F.2d 1214 (5th Cir. 1979), or mental circumstances relevant to sentencing, *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985), ineffective assistance is demonstrated. The sixth amendment right to counsel is inextricably tied to the right to expert psychiatric assistance. There is in fact a critical dependency between the right to effective assistance of counsel and the separate right to competent mental health assistance for a criminal defendant. Mental health experts are essential for the preparation of a defense and for sentencing whenever the State makes mental health relevant to those issue. *Ake v. Oklahoma*, 105 S.Ct. 1087 (1985). This independent due process right is necessarily enforceable through the right to effective counsel—what is required is a competent health evaluation, and it is up to counsel to obtain it. *Blake v. Kemp*, 758 F.2d 523, 529 (11th Cir. 1985).

It would *never* be appropriate to accede to the demands of a client when the client has not had the benefit of adequate advice, founded on independent investigation and evaluation. Advice requires investigation, and a client's decisions must be made *after* proper counsel. "Un-

counseled jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better informed advice." *Martin v. Maggio*, 711 F.2d 1273, 1280 (5th Cir. 1983). "After informing himself fully on the facts of law, the lawyer should advise the accused . . .", *Defense Function*, 5.1(a), and decisions made by clients without advice based on independent investigation are decisions made without "the guiding hand of counsel." *Powell v. Alabama*, 287 U.S. 45 (1932). "Under any professional standard, it is improper for counsel to blindly rely on the statement of a criminal client whose reasoning abilities are highly suspect." *Brennan v. Blankenship*, 472 F.Supp. 149, 156 (D.C. W.D. Va. 1979)

#### CLAIM V

THE STATE INTRODUCED CONVICTIONS PREDICATED UPON GUILTY PLEAS WHICH, ON THEIR FACE, REVEALED 1.) THAT THEY WERE NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTERED, AND 2.) WERE TAKEN WITHOUT THE ASSISTANCE OF COUNSEL; IN ADDITION, THE PLEA TRANSCRIPTS INTRODUCED CONTAINED REFERENCES TO OTHER UNCONVICTED CRIMINAL ACTS, ALL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, REQUIRING RESENTENCING

This claim is evidenced by the following facts:

1. All other allegations in this petition are incorporated into this claim by specific reference.
2. The only evidence introduced by the State at sentencing was Exhibits 2-6. These exhibits revealed five prior convictions of Petitioner, which the State labeled Petitioner's "resume":



When Larry Lonchar comes before you, in the presence of you, and through his attorney ask you for mercy, here is his resume, that is his resume.

(R. 1410). The prosecutor had discussed Petitioner's prior record for three pages of transcript before this "resume" argument, and continued to stress Petitioner's record as a prime basis for death throughout his closing argument. As the United States Supreme Court emphasized in *Johnson v. Mississippi*, — U.S. —, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988), any error in the introduction of invalid prior convictions is especially prejudicial where the convictions are emphasized by the prosecuting attorney in closing argument:

We eschew 'harmless error' in our reasoning . . . because the district attorney argued this particular aggravating circumstance as a reason to impose the death penalty.

*Id.*, 108 S. Ct. at 1989 n. 8 (quoting *Johnson v. State*, 511 So.2d 1333, 1338 (Miss. 1987)).

3. Exhibits 2-6 were inadmissible, for a variety of reasons. As an initial matter, Petitioner has a long-standing mental impairment which raises a *bona fide* doubt as to his competency with respect to each of the convictions. No hearing was ever held to determine Petitioner's competency at that time he was convicted of these crimes, although our Supreme Court held in *Baker v. State*, 250 Ga. 187 (1982), that "the actual issue of present incompetence *must be addressed* if there is evidence of incompetence which manifests itself during the proceedings." *Id.* at 191 (emphasis supplied). As is clear from *Baker*, competency is a non-waivable issue, and must be addressed at this time:

The State insists that Robinson deliberately waived the defense of his competence . . . by failing to demand a sanity hearing . . . . *But it is contradictory to argue that a defendant may be incom-*

*petent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity. . . . In any event, the record show that counsel throughout the proceedings insisted that Robinson's present sanity was very much at issue.*

*Pate v. Robinson*, 383 U.S. 375, 384, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966) (emphasis supplied); *see also Drope v. Missouri*, 420 U.S. 162, 43 L. Ed. 2d 103, 95 S. Ct. 896 (1975). This mental impairment, described in detail above, impacted all the various constitutional and statutory defects described below:

a-1. *Exhibit 1*<sup>11</sup>—This involved a conviction and sentence entered December 22, 1969, for the offense of breaking and entering. The plea was taken November 21, 1969, and the plea transcript reveals that the plea was not knowingly, intelligently and voluntarily entered. Petitioner was not properly advised regarding, and hence did not waive, all of the rights embodied in trial by jury. He was not advised of the presumption of innocence, the right to confrontation, the right to cross-examination, the right to silence, the right to testify, the right to have no comment made regarding his silence, the right to the assistance of counsel, the right to appeal, etc.

a-2. The pleas was plainly entered in violation of *Boykin v. Alabama*, 395 U.S. 238 (1969), and the con-

<sup>11</sup> The State had pre-marked six exhibits, 1-6. What the State had originally tendered as Exhibit 1 at sentencing was excluded. This "Exhibit" appears in Volume VI, record on appeal, immediately after p. 1644. The actual exhibit 1 appears at and after p. 1645, although it was pre-marked and remained marked as State's Exhibit Sentencing 2. All of the 11 pages appearing after p. 1645 were introduced, as the designation at the bottom of the pages indicate. Each page was pre-marked "SS2" as State's Sentencing 2.

All 5 exhibits were treated in this way. Hence, State's Sentencing Exhibit No. 2, appearing after page 1646 was premarked "State's Sentencing Exhibit 3" and every page contains "SS3" at the lower right hand corner. All reference here to the Exhibits will be to the *admitted*, not the pre-marked, number.

viction and sentence were inadmissible in this capital sentencing proceeding. Additionally, the plea transcript included reference to a separate two count indictment which contained in Count 1 a charge against Petitioner of attempted robbery with a 22 calibre revolver.

a-3. He purportedly then pled to Count two, larceny. Exhibit 1 does not contain that two count indictment, or a judgment of conviction. The purported plea colloquy was clearly inadmissible, because no conviction was introduced. The jury was therefore led to believe that Petitioner had more convictions than the prosecution actually presented. The United States Supreme Court first recognized over forty years ago that due process prohibits the sentencer from relying, even in part, on false representations regarding the accused's prior convictions. See *Townsend v. Burke*, 334 U.S. 736 (1948); accord *Johnson v. Mississippi*, 108 S. Ct. at 1987. This "evidence" was also inadmissible because, like the breaking and entering plea, it was taken in complete disregard of the *Boykin* requirements.

b-1. *Exhibit 2*—This involved a conviction for burglary supported by a plea entered December 8, 1969. On the face of the plea colloquy it is revealed that Petitioner was not represented by counsel, but represented himself at the hearing. As the United States Supreme Court "held in *United States v. Tucker*, 404 U.S. 443, 447-49, 92 S. Ct. 589, 591-93, 30 L. Ed. 2d 592 (1972), even in a noncapital sentencing proceeding, the sentence must be set aside if the [sentencer] relied at least in part on 'misinformation of constitutional magnitude' such as prior uncounseled convictions . . . ." *Zant v. Stephens*, 462 U.S. 862, 887 n. 23, 103 S. Ct. 2733, 2748 n. 23, 77 L. Ed. 2d 235 (1983); accord *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258 (1967).

b-2. Even under the standards required in a criminal case where there is no doubt as to the mental state of the accused, there was no valid waiver of counsel, as

Petitioner was not advised of the dangers and disadvantages of self-representation. *Faretta v. California*, 422 U.S. 806 (1975).

b-3. Petitioner was not advised of the presumption of innocence, the right to silence, the right to testify, the right not to testify and not to have that used against him, the right to appeal, etc. The plea was plainly taken in violation of *Boykin*. Before a defendant—let alone one whose competency is in question—can make any waiver, the State must make a showing that a waiver has been made "with a full understanding of what [it] connotes and its consequences. . . ." *Boykin v. Alabama*, 395 U.S. at 243-44; see also, *McCarthy v. United States*, 394 U.S. 459, 466 (1969). The Georgia Supreme Court has held the same, noting that when the voluntariness of a guilty plea is presented, "the burden in on the state to establish a valid waiver." *Pope v. State*, 256 Ga. 189, 345 S.E.2d 831, 844 (1986) (emphasis supplied).

b-4. In *Fay v. Noia*, 372 U.S. 391 (1963), the United States Supreme Court held that the State must show that the:

applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as . . . deliberate . . . .

*Id.* at 439. Respondent's burden is therefore a heavy one and has not been met in this case.

c. *Exhibit 3*—This exhibit included a two count indictment, and a plea transcript. The indictment charged two crimes, burglary and larceny. Mr. Lonchar pled *only* to larceny, but the jurors, through the plea transcript and indictment, were exposed to the unconvicted charge of burglary. Furthermore, during the plea colloquy, Petitioner confessed to a completely unrelated uncharged,



and unconvicted offense. Finally, the plea was taken in violation of *Boykin*. (R. 1642).

d. *Exhibit 4*—This exhibit included a two count indictment charging robbery and larceny. A plea was entered to larceny. During the plea, evidence was introduced that Petitioner was on parole, and the he could be sentenced for the offense of committing an offense while on parole. Count I, the robbery count, was dismissed. Another robbery charge, completely unrelated to the charge in Exhibit 4, was also discussed: "Count I would be dismissed together with another charge, that of armed robbery of the Spring Lanes Bowling Alley, I think File Number 28-62."

e. *Exhibit 5*—This exhibit involved a two count indictment charging armed robbery and possession of a firearm during the commission of a felony. A plea was entered to both counts. During the taking of the pleas, the Court commented that, "before we get started, not too long ago on another case you changed your mind about offering a plea, which, of course, is your privilege." He also told the Petitioner that he had committed the crime of being a repeat offender, which was not charged. Defense counsel referred to other charges and potential charges, that would either be dismissed or not instituted: 1.) a pending case of armed robbery and possession of a firearm during commission of an offense, 2.) a pending case of felonious assault and possession of a firearm, and 3.) habitual criminal charges.

4. In each of these cases, the prosecution was allowed to submit records which indicated that Petitioner would be granted parole, or early release. In State's Exhibit 4, the sentencing judge made extensive reference to the question of parole. (Exh. 4 at 3-4; see also Exh. 5 at 3-4) This was in flagrant violation of this State's policy, which requires an automatic mistrial if the jury is tainted by reference to parole. See *O.C.G.A. § 17-8-76*. As the Supreme Court of Georgia recently stated, "a defendant's

parole eligibility is not, and ought not to be, an issue considered by the jury in the sentencing phase of a capital trial." *Quick v. State*, 256 Ga. 780, 353 S.E.2d 497, 503 (1987) (citing *Westbrook v. State*, 256 Ga. 776, 353 S.E.2d 504 (1987)).

5. In each of these cases, where counsel was provided, Petitioner did not receive the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

#### CLAIM VI.

BY REFUSING TO ALLOW THE INTRODUCTION OF EVIDENCE BY PETITIONER TO CORRECT THE JURORS' MISTAKEN BELIEF OF HOW LITTLE TIME PETITIONER WOULD SERVE IN JAIL IF HE WERE NOT SENTENCED TO DEATH, ANY BY REFUSING TO ANSWER THE JURORS' QUESTION ABOUT THE MEANING OF A LIFE SENTENCE, THE TRIAL COURT VIOLATED PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. During voir dire, the potential jurors revealed a commonly held belief regarding what is meant by life imprisonment—that a person sentenced to life imprisonment would not be imprisoned for life, but would be released in as little as seven (7) years. For example, potential Juror Comm believed a person sentenced to life would serve "[s]even years or 12 years," (R. 91), potential Juror Pennyman believed it would be "seven years," (R. 115), potential Juror Baker believed it would be "seven years," (R. 404), potential Juror Taylor believed it would be "seven years," (R. 421). Juror Bolton believed life imprisonment meant "just a certain number

of years and they are on probation," (R. 99), juror Jones believed a person could "get out," (R. 164), Juror Hansen believed "they can get out," (R. 249), Juror Kirkpatrick did not think life meant life, (R. 261), and Juror Jimmy Wilson believed life did not mean life, (R. 299). Other potential jurors believed a person sentenced to life imprisonment could "get out," (R. 164), that "some do and some don't," (R. 189), that there was "a chance for parole," (R. 220), that "they could have their sentence reduced," (R. 255), that "there are some people let out on probation," (R. 339), and that life did not mean life. (R. 262, 286, 295, 428).

3. The problem was recognized by the trial court in Petitioner's case:

THE COURT: They are not going to know if they sentence him to life imprisonment that he is going to be eligible for parole in 30 years.

(R. 1395) However, in refusing to instruct the jury on this crucial issue, the trial court left the jurors floundering in their misperceptions. *See, generally, Faduano & Smith, Deathly Errors: Juror Misperceptions Concerning Parole*, 18 COLUM. HUM. RTS. L. REV. 211 (1987) (discussing constitutional implications of jurors' misperceptions concerning parole in Georgia cases).

4. Because the jurors in this case were ignorant of the alternative of life without possibility of parole for at least thirty (30) years—by which time Petitioner would have been over sixty-five (65) years old—defense counsel requested a jury charge that if a defendant was sentenced to three consecutive life sentences, he would be required by Georgia law to serve a minimum of thirty years in prison. (R. 1332). Counsel for the State stipulated that that was the law, and that the members of the Georgia Board of Pardons and Paroles would follow that law in Larry Lonchar's case. (R. 1338, 1361). The state objected to the charge because Georgia law forbids use of

the word "parole," but defense counsel did not insist that the word parole be used. (R. 1337). The judge refused the requested instruction, and the proffered testimony. (R. 1361).

4. After considerable deliberation, the jury sent a question to the judge. Then the following record discussion occurred:

THE COURT: The question is: "Does life imprisonment mean—does life imprisonment on each [of three] count[s] mean the sentence will be served consecutively?" I can't answer the question. That was the question that I received from the jury.

MR. LEIPOLD: My response would be the appropriate answer would be that is within the discretion of the Court, which I think is the truth and a correct response, and I don't think it injects anything into the case.

THE COURT: What do you say?

MR. PETREY: The first response, Your Honor, you can't answer that question. That would be our request on that.

(R. 1457-58). The court refused to answer the sentencer's question. (R. 1465).

5. As a matter of federal constitutional law, the jury should have been instructed accurately on their sentencing alternatives, granted the ample evidence that they were speculating inaccurately. "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 108 S. Ct. at 1986 (quoting *Cardner v. Florida*, 430 U.S. 349, 363-64, 97 S. Ct. 1197, 1207-08, 51 L. Ed. 2d 393 (1977)). As noted previously, the United States Supreme Court has held that



"even in a noncapital sentencing proceeding, the sentence must be set aside if the [sentencer] relied at least in part on 'misinformation of constitutional magnitude' . . . ." *Zant v. Stephens*, 462 U.S. at 887 n. 23 (quoting *United States v. Tucker*, 404 U.S. at 447-49).

6. As a matter of Georgia law, certainly when the jury returned with a question they should have been instructed, at a minimum, that such speculation would violate their oaths:

If . . . the jury asks to be instructed about the possibility of parole, the court should mention the issue . . . to the extent of telling the jury in no uncertain terms that such matters are not proper for the jury's consideration.

*Quick v. State*, 256 Ga. 780, 353 S.E.2d 497, 503 (1987) (footnote omitted).

#### CLAIM VII.

BY REFUSING ACCURATELY TO INSTRUCT THE JURY REGARDING WHAT WOULD OCCUR IN THE EVENT A UNANIMOUS DECISION COULD NOT BE REACHED REGARDING SENTENCE—PARTICULARLY WHEN THE JURORS RETURNED TO COURT AND ASKED THAT EXACT QUESTION—THE TRIAL COURT VIOLATED PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

This claim is evidenced by the following facts:

1. All other allegations in this petition are incorporated into this claim by specific reference.
2. Defense counsel requested that the trial judge instruct the jury, accurately and in accordance with Georgia law, that one verdict they were entitled to return was:

"We, the jury, are not able to reach a unanimous verdict." (R. 310, 1393). Unlike the first phase of a capital trial in Georgia, where a non-unanimous verdict is a mistrial that requires retrial, a non-unanimous verdict at capital sentencing *is* a verdict that results in imposition of a life sentence, *not* resentencing. The requested charge was denied. (R. 1394).

3. After considerable deliberation, the jurors asked a question of the judge:

THE COURT: You are going to love this one: "We'd like you to instruct us as to what we do if we cannot reach a unanimous decision."

(R. 1467). The Court's response to the jury was that he would not accept a decision "at this point," and he refused to answer the jurors' question about what would happen if the jurors were not unanimous.

4. The jurors continued deliberating, and after seven hours could not reach such a decision. Only after coming back the next day—Sunday—were they able to deliver the verdict.

#### CLAIM VIII.

THE FAILURE TO INSTRUCT THE JURY THAT THEIR EVALUATION OF THE EVIDENCE ADDUCED IN MITIGATION MUST BE MADE INDIVIDUALLY DEPRIVED PETITIONER OF HIS RIGHT TO MEANINGFUL CONSIDERATION OF HIS MITIGATING EVIDENCE.

This claim is evidenced by the following facts:

1. All other claims in this petition are incorporated in this claim by reference.
2. No principle of Eighth Amendment law can be clearer than the requirement that jurors be required to consider any evidence proffered by the defense in mitigation. *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57

L. Ed. 2d 973 (1978); *Bell v. Ohio*, 438 U.S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982).

3. In this case, not only were the jurors not told that they *could* make a non-unanimous finding which would result in a life sentence, *see, supra*, but they were also not told that they *must* individually evaluate the evidence in mitigation, in light of the aggravating circumstances.

#### CLAIM IX.

BY PEREMPTORILY AND DISCRIMINATORILY EXCUSING FOUR BLACK JURORS, THE PROSECUTOR VIOLATED THE PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

This claim is evidenced by the following facts:

1. All other allegations in this petition are incorporated into this claim by specific reference.
2. The prosecutor peremptorily challenged four black female jurors—Anna Pennyman, Annie Harris, Deridre Copeland, and Mildred Baker. The prosecutor gave no reason for the excusal of these jurors.
3. The prosecutor's discriminatory excusal of black potential jurors violated Petitioner's constitutional rights to be tried by a jury comprised of a fair cross-section of the community, to reliable fact-finding determinations, and to equal protection, guaranteed by the sixth, eighth, and fourteenth amendments.

#### CLAIM X.

PETITIONER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT AND *STRICKLAND v. WASHINGTON*.

This claim is evidenced by the following facts:

1. Petitioner hereby specifically incorporates by reference all the allegations which have been made above.
2. Petitioner specifically incorporates into this section any deficiency alleged by the State regarding counsel's failure to preserve issues arising out of the violation of Petitioner's rights at his trial for appellate review.
3. In addition to the previous errors committed by counsel, counsel failed to locate and present many potential witnesses who could have testified to Petitioner's history of mental instability, as well as his redeeming qualities. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). Counsel failed to secure and present critical evidence relating to Petitioner's history of incarceration which would have negated the effect of the illegitimate introduction of Petitioner's prior convictions. *See, supra, Section V*. As a consequence, the jury was precluded from evaluating important evidence of Petitioner's potential for adapting to the prison environment. *See Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986).

#### CLAIM XI.

PETITIONER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL IN VIOLATION OF THE SIXTH AMENDMENT AND *EVITTS v. LUCEY*.

This claim is evidenced by the following facts:

1. Petitioner hereby specifically incorporates by reference all the allegations which have been made above.



2. Petitioner hereby specifically alleges that he received ineffective assistance of counsel with respect to each issue which the State alleges was omitted or improperly preserved on his direct appeal to the Georgia Supreme Court. *See Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

### CLAIM XII.

#### THE DENIAL OF PETITIONER'S RIGHT TO A PUBLIC TRIAL VIOLATED THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS STATE LAW.

This claim is evidenced by the following facts:

1. Petitioner hereby specifically incorporates by reference all the allegations which have been made above.
2. The courtroom was cleared of spectators and the press when the jury reported the sentence in this case, and the sentence was kept sealed for two days.

### CLAIM XIII.

#### WHERE LIFE ITSELF IS AT STAKE, DUE PROCESS AND THE EIGHT AMENDMENT PROHIBIT THE DEKALB COUNTY SUPERIOR COURT FROM SETTING AN EXECUTION DATE WITHOUT PRIOR NOTICE TO COUNSEL WHERE COUNSEL HAD BEEN ASSURED TIME IN WHICH TO FILE ANY PAPERS IN THE CASE.

This claim is evidenced by the following facts:

1. Petitioner hereby specifically incorporates by reference all the allegations which have been made above.
2. Undersigned counsel were informed that Petitioner had written to the DeKalb County Superior Court requesting an execution date. The clerk for the trial court assured

counsel that no execution date would be set until counsel had had an opportunity to file papers with the trial court requesting a hearing. Counsel was allowed until Thursday, March 8, 1990, to submit such papers.

3. Prior to the time in which counsel was to file papers, and without notice or a hearing, the trial court scheduled Petitioner's execution. The trial court refused to vacate the order, and the Supreme Court of Georgia refused to stay the proceedings. Both courts referred the issue to this Court for resolution.

4. "The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S. Ct. 1011, 25 L. Ed. 287 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L. Ed. 2d 1363 (1914)). For example, when the State seeks to revoke parole, "the parolee should be given notice that the hearing will take place and [of] its purpose. . . . At the hearing the parolee may appear and speak in his own behalf. . . ." *Morrissey v. Brewer*, 408 U.S. 471, 487, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (emphasis supplied).

5. If notice and a hearing must constitutionally be provided prior to revocation of probation or parole,<sup>12</sup> or prior to termination of welfare benefits,<sup>13</sup> how much more important is it that Petitioner and counsel be given notice and an opportunity to be heard prior to his execution being scheduled? As Chief Justice Burger stated in *Morrissey v. Brewer*, "[w]hether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'" *Id.* at 481 (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341

<sup>12</sup> See *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

<sup>13</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

U.S. 123, 168, 71 S. Ct. 624, 95 L. Ed. 2d 817 (1951) (Frankfurter, J., concurring). What more grievous loss can there be than loss of life?

6. This Court should vacate the order which has been entered, without notice and without an opportunity to be heard.

### CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE Petitioner requests that this Court order the following relief:

1. That the next friend be allowed to pursue this litigation.
2. That a stay of execution enter.
3. Sufficient time to adequately prepare and present his post-conviction petition.
4. Funds for the assistance of investigative and other expert assistance necessary for the preparation and presentation of his petition.
5. Funds to take the depositions of witnesses necessary to his case.
6. Funds to compel the attendance of witnesses, from within and without the State, necessary to his case.
7. A hearing at which he may present evidence in support of his claims.
8. Relief from his unconstitutional conviction and/or sentence.

/s/ Michael Mears/MEO  
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 Decatur GA 30030-0207  
 (404) 377-5684  
 Counsel *pro bono publico*

## IN THE SUPERIOR COURT OF BUTTS COUNTY STATE OF GEORGIA

Civil Action No. 93-V-99

HABEAS CORPUS

LARRY GRANT LONCHAR,  
*Petitioner,*

v.

WALTER D. ZANT, Warden,  
*Respondent.*

### PREHEARING BRIEF ON BEHALF OF RESPONDENT

COMES NOW Walter D. Zant, Respondent in the above-styled action, by counsel, Michael J. Bowers, Attorney General for the State of Georgia, and submits this prehearing brief addressing certain procedural issues related to the instant petition.

### PART ONE

#### STATEMENT OF THE CASE

Larry Grant Lonchar was convicted in the Superior Court of DeKalb County Georgia, of three counts of malice murder and one count of aggravated assault and sentenced to death for the malice murder convictions and twenty years imprisonment for the conviction of aggravated assault. The Supreme Court of Georgia affirmed the convictions and sentences on July 12, 1988, and denied a motion for rehearing on July 29, 1988. Lonchar



*v. State*, 258 Ga. 447, 369 S.E.2d 749 (1988). The Supreme Court of the United States denied a petition for a writ of certiorari on January 9, 1989, and a petition for rehearing on February 27, 1989. *Lonchar v. Georgia*, — U.S. —, 109 S.Ct. 818, *reh'g. denied*, — U.S. —, 109 S.Ct. 1332 (1989).

On March 8, 1990, an order was entered by the Superior Court of DeKalb County, Georgia, scheduling a new execution time period for March 23, 1990, through March 30, 1990. Shortly after the order scheduling the new execution time period was filed, attorney Michael Mears, apparently without the consent of Mr. Lonchar, filed a "Motion to Require that Mr. Lonchar Be Certified Competent Prior to the State of Georgia Joining his Attempt to Commit Suicide" in the criminal action in the Superior Court of DeKalb County. A hearing was held on the matter on March 13, 1990, and an order was entered on March 14, 1990, with the Superior Court of DeKalb County concluding that the Court did not have jurisdiction or venue to consider the action and directing that the motion be transferred to the Superior Court of Butts County for further proceedings.

Subsequently, attorney Mears, again without authority from Mr. Lonchar and without acting on behalf of anyone as next friend at that time, filed an emergency motion for stay of execution in the Supreme Court of Georgia and a notice of appeal from the original order scheduling the execution time period. On March 20, 1990, the Supreme Court of Georgia deemed that the motion to stay the execution was premature and dismissed the motion without prejudice so that an application could be filed in the Superior Court of Butts County, Georgia.

A hearing was tentatively scheduled in the Superior Court of Butts County on March 21, 1990. On the day of the scheduled hearing, counsel for the Respondent was served with a motion for a stay of execution and a peti-

tion for a writ of habeas corpus filed by Mr. Mears as counsel for Mr. Lonchar's sister, Chris Lonchar Kellogg. At the hearing, Mr. Mears, representing Ms. Kellogg, sought to have the Court allow her to proceed as next friend and sought to have the Court declare Mr. Lonchar incompetent in order that the next friend petition might proceed. Mr. Mears acknowledged that he was not asserting that Mr. Lonchar was incompetent to be executed. Mr. Lonchar emphatically stated that he opposed any petition being filed and specifically stated that he did not have counsel representing him. Mr. Lonchar made no request for counsel at any time during the hearing.

At the first hearing in the Superior Court of Butts County, Mr. Mears submitted on behalf of Ms. Kellogg, a set of documents including a report from Dr. Robert Phillips allegedly finding Mr. Lonchar incompetent to waive his appeals. Respondent requested an opportunity to have an examination conducted of Mr. Lonchar by an expert for the Respondent in order to present information to the Court. Respondent did not concede that any prima facie case had been established or that there was a bona fide doubt as to Mr. Lonchar's competency, but simply requested the opportunity so that the Court could have as much information as possible prior to making the decision. The hearing was recessed pending further order of the Court to give the Respondent equal opportunity to have Mr. Lonchar examined.

On March 28, 1990, the Superior Court of Butts County held a hearing to determine Mr. Lonchar's competency to waive any further proceedings. At the conclusion of that proceeding, the Court entered a ruling from the bench noting that the Court would enter a written order the following morning. The Court entered a written order on March 29, 1990, and, after examining the standard in *Rees v. Peyton*, 384 U.S. 318 (1966), and related cases from several circuit courts, concluded from the evi-

dence before it that Mr. Lonchar was competent. Considering all of the facts in the record, the Court specifically found that Mr. Lonchar met the standard of *Rees v. Peyton* and that he, in fact, had the capacity to appreciate his position and make a rational choice with respect to continuing further litigation and that any disorder he might have did not rise to the level of substantially affecting his capacity in the premises. Therefore, the Court having found Mr. Lonchar competent, ruled that Ms. Kellogg did not have standing to present a next friend petition in state court. At the conclusion of the hearing on March 28th, the Court specifically inquired of Mr. Lonchar if he had changed his mind and Mr. Lonchar responded that he had not. Thus, the Superior Court of Butts County denied the motion for a stay of execution and declined to allow Ms. Kellogg to proceed.

Counsel for Ms. Kellogg then filed an application for a certificate of probable cause to appeal in the Supreme Court of Georgia. The Court granted the stay of execution on March 29, 1990, to allow the Court to receive and consider the transcript of the hearing in the state habeas corpus court. That transcript was filed with the Supreme Court of Georgia on or about April 11, 1990. On May 2, 1990, the Court issued an opinion dismissing the application for a certificate of probable cause to appeal and terminating the stay of execution. *Kellogg v. Zant*, 260 Ga. 182, 390 S.E.2d 830 (1990). In its opinion, the Supreme Court of Georgia specifically found that Mr. Lonchar is "not psychotic, has normal intelligence and is competent to decide not to appeal further." *Id.* at 184. A subsequent petition for rehearing which was filed on May 14, 1990, was denied by the Supreme Court of Georgia on May 23, 1990.

Mr. Mears then filed a petition for a writ of certiorari in the Supreme Court of the United States on behalf of Ms. Kellogg. In addition, counsel for Ms. Kellogg sought to

consolidate the case with one pending from the State of Texas. On October 1, 1990, the request for consolidation and the petition for a writ of certiorari were denied and the petition for rehearing was denied on December 3, 1990. *Kellogg v. Zant*, — U.S. —, 111 S.Ct. 231, *rehg. denied*, — U.S. —, 111 S.Ct. 573 (1990).

On October 23, 1990, Ms. Kellogg, by attorney Mears, filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia seeking to proceed on behalf of Mr. Lonchar. A status conference was held on November 7, 1990, and the Respondent submitted documents from the state proceedings to the district court on November 8, 1990. Both parties submitted briefs as to the need for an evidentiary hearing. On April 22, 1991, the district court entered an order stating that the court was without jurisdiction to consider the matter until the state proceedings were completed. On June 10, 1991, the court entered an order providing the Respondent with a time period in which to file a motion to dismiss. On July 10, 1991, Respondent Zant filed a motion to dismiss for lack of standing.

On August 15, 1991, the district court entered an order setting a discovery conference and deferring ruling on the motion to dismiss pending a hearing to be held on Mr. Lonchar's competency. After various depositions were taken by both parties, an evidentiary hearing was held on November 12, 13, and 14, 1991. After post-hearing briefs were filed, the district court entered an order and judgment on February 18, 1992, granting Respondent's motion to dismiss for lack of standing. Ms. Kellogg filed a notice of appeal on February 20, 1992, and an application for a certificate of probable cause to appeal. On March 12, 1992, the district court granted a certificate of probable cause to appeal.

The Eleventh Circuit Court of Appeals entered an opinion on November 13, 1992, affirming the decision



of the district court and finding that Ms. Kellogg lacked standing to proceed on behalf of Mr. Lonchar. *Lonchar v. Zant*, 978 F.2d 637 (11th Cir. 1992). That court specifically concluded that competency was a factual issue and that the court was required to accept the factual findings of the district court unless they were clearly erroneous, that Ms. Kellogg had the burden to establish her standing to proceed as next friend, that the district court's finding that Mr. Lonchar was not incompetent under the *Rees v. Peyton* standard was not clearly erroneous and further rejected Ms. Kellogg's claim that medical treatment had been withheld from Mr. Lonchar and that his decision was thus involuntary finding no evidence in the record to support the assertions by Ms. Kellogg.

On or about December 2, 1992, Ms. Kellogg filed a petition for rehearing and suggestion for rehearing en banc which was denied on January 12, 1993. Ms. Kellogg filed a motion for stay of the mandate which was denied by the Eleventh Circuit Court of Appeals on January 25, 1993, and the judgment was issued as the mandate on that same date.

On or about February 4, 1993, Ms. Kellogg submitted a petition for a writ of certiorari in the Supreme Court of the United States. On February 5, 1993, the state trial judge signed a new execution order scheduling the time period for Mr. Lonchar's execution between noon on February 24, 1993, and noon on March 3, 1993. Ms. Kellogg filed a motion for stay of execution in the Supreme Court of Georgia which was denied on February 13, 1993. Certiorari was denied by the Supreme Court on February 24, 1993.

Petitioner Lonchar subsequently consented to a petition being filed in his behalf and the instant petition was filed in the Superior Court of Butts County. A stay of execution was granted by the Superior Court of Butts County. On April 6, 1993, the case was assigned to the

Honorable Kristina Cook-Connelly, Judge of the Superior Court of the Lookout Mountain Judicial Circuit.

Various motions have been filed by both parties. On July 28, 1993, counsel for Respondent wrote a letter to the court advising the court that she had received a letter from Mr. Lonchar stating that he wanted to dismiss his petition and proceed with his execution. The case was originally scheduled for a hearing on October 29, 1993, but was continued due to injury to one of Petitioner's attorneys. An order was entered on November 4, 1993, stating that the "pretrial hearing" was continued until further order of the court. Counsel for Respondent subsequently received another letter from Mr. Lonchar which was forwarded to the court on September 28, 1993, stating that he did not want to be represented by either Mr. Stafford Smith or Mr. Bayliss. A hearing was then scheduled for April 19, 1994, but was continued on order from the court. The hearing has now been scheduled for June 24, 1994. The last communication received by counsel for Respondent was that Mr. Lonchar wanted to dismiss the petition.

In addition to Mr. Lonchar's request to dismiss the petition and counsel, the following motions are pending before the court:

- Petitioner's Motion to Proceed in Forma Pauperis;
- Petitioner's Motion for Funds for Attorney's Fees, Investigation Fees, Expert Assistance and Hearing Expenses;
- Petitioner's Motion to Supplement the Record;
- Respondent's Motion for Pretrial Order;
- Respondent's Motion to Prohibit Ex Parte Proceedings and to Compel Service of All Pleadings; and
- Respondent's Motion for Clarification of Purpose of Scheduled Hearing, Ruling on Respondents' Motion

for Pretrial Order and Ruling on Respondent's Motion to Prohibit Ex Parte Proceedings and Compel Service of All Pleadings.

## PART TWO STATEMENT OF FACTS

The Supreme Court of Georgia set forth the following facts on direct appeal in relation to the underlying crimes:

Charles Wayne Smith and his son, Steven Smith, ran a bookmaking operation out of a condominium in DeKalb County. Lonchar became several thousand dollars in debt to the operation, and on October 13, 1986, visited the condominium, accompanied by Mitchell Wells. At the time they visited, four people were in the condominium. The three murder victims, Wayne Smith, Steven Smith, and Wayne's companion, Margaret Sweat, were in the living room. Richard Smith (another of Wayne Smith's sons), the aggravated assault victim, was in a bedroom. At trial Richard Smith testified that he heard a knock on the door and then saw Lonchar enter the living room. He added that Lonchar displayed a badge and identified himself as special agent Larry Lonchar. Wayne Smith and Steven Smith were then handcuffed.

Richard Smith heard four or five shots from the living room and then Wells came to his bedroom, shot him several times and left. He pretended he was dead while the condominium was ransacked. Shortly thereafter, afraid he would bleed to death, he picked up the extension telephone in the bedroom and heard Sweat talking to the police. Then she yelled, "they're back." Richard Smith crawled to the living room and saw a man wearing a trench coat leave the condominium.

## IN THE SUPERIOR COURT OF BUTTS COUNTY STATE OF GEORGIA

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### BRIEF IN OPPOSITION TO DISMISSAL WITH PREJUDICE

Comes now undersigned counsel for Larry Grant Lonchar, and respectfully submits this brief in opposition to the dismissal of Mr. Lonchar's petition for writ of habeas corpus "with prejudice."<sup>1</sup> In support thereof, Mr. Lonchar shows the following:

At the pre-trial hearing held on June 23, 1994, this Court called Mr. Lonchar to the stand as the Court's witness. Mr. Lonchar indicated his current wish to dismiss his petition for writ of habeas corpus, filed in this Court on February 25, 1993.<sup>2</sup> Mr. Lonchar also testified that he was "not going to stop [his execution] again." (emphasis added).<sup>3</sup> The Court indicated its intention

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<sup>1</sup> Counsel submit this brief based upon the Court's expressed intention to dismiss Mr. Lonchar's habeas petition, and request for briefing on whether the dismissal should be with or without prejudice. In submitting this Brief, counsel do not waive any objection to the Court's decision to permit Mr. Lonchar to dismiss his petition and his attorneys, or any other rulings made by the court in this proceeding.

<sup>2</sup> As counsel for Mr. Lonchar stated at the hearing—and Respondent did not dispute—Mr. Lonchar's petition raises meritorious claims of constitutional violations which clearly warrant the granting of habeas relief.

<sup>3</sup> At this time, no transcript of the pretrial hearing has been provided to counsel. The quotes provided in this brief are based upon counsel's notes of the hearing, and are believed to be substantially accurate.



to grant Mr. Lonchar's request to dismiss the petition. Respondent requested that the Court dismiss Mr. Lonchar's petition with prejudice, noting that Respondent's "only concern" was that Mr. Lonchar would change his mind again at the last minute. Counsel for Mr. Lonchar objected to a dismissal with prejudice, and the Court requested that the parties brief the issue. In the paragraphs below, counsel for Mr. Lonchar argue in opposition to a dismissal of the petition with prejudice.

- I. Either Mr. Lonchar is Serious About His Desire to Die, in Which Case Dismissal of His Petition Without Prejudice Will Not Harm the State, or He is Not Serious About Dismissing His Petition, Calling into Question the Voluntariness and Competence of Mr. Lonchar's Decision and Militating Against a Dismissal With Prejudice.

Respondent has asked the Court to honor Mr. Lonchar's current desire to drop his appeals, and expressed his position that Mr. Lonchar is making a competent and rational decision which must be respected. At the same time, Respondent asks the Court to dismiss Mr. Lonchar's petition with prejudice, to prevent him from vindicating his constitutional rights in the event he realizes that he does not really want to die. This Court should not permit Respondent to call both 'heads' and 'tails.' If Mr. Lonchar's decision is truly rational, competent, and voluntary (as Respondent argues), one could expect him to maintain it to the very moment of his death. In that event, the potential consequences of a dismissal without prejudice—the re-assertion of constitutional claims which require the reversal of Mr. Lonchar's 1987 convictions and death sentences—would be mooted by the execution. If Mr. Lonchar's statement of his current desire cannot be trusted (as Respondent also seems to argue), and Mr. Lonchar's stated desire to drop his appeals is just another swing of the pendulum presaging a return to competence and a renewed desire to vindicate his constitutional rights,

the dismissal of the petition without prejudice will prevent the ultimate miscarriage of justice—the execution of someone who is seriously mentally ill and was convicted and sentenced to death amid constitutional violations which have never been reviewed by any court. If the Court intends to dismiss Mr. Lonchar's habeas petition based upon his current desires as expressed at the hearing, mindful of the fact that he changed his mind previously after several years of vacillation, this Court should dismiss the petition without prejudice.

- II. A Dismissal With Prejudice Would Result in Mr. Lonchar's Execution Even If He Were to Change His Mind Again.

If this Court were to dismiss Mr. Lonchar's habeas petition with prejudice to his re-filing the petition at some later time, there would be little realistic chance of preventing Mr. Lonchar's execution in the event of another last minute resumption of competence and reassertion of his will to live. Mr. Lonchar has demonstrated his mental illness and the uncertainty of his commitment to his own destruction in many ways.<sup>4</sup> While he sought unsuccessfully to waive the mandatory direct appeal to the Georgia Supreme Court, Mr. Lonchar agreed to allow counsel to file a discretionary petition for writ of certiorari in the United States Supreme Court. While he sought for several years to prevent his sister from litigating a habeas petition on his behalf, Mr. Lonchar maintained regular contact with the very attorneys who he said were thwarting his wish to die. Ultimately, of course, Mr. Lonchar

<sup>4</sup> Counsel offered to present to this Court in an *ex parte*, in camera proceeding several critical examples of Mr. Lonchar's vacillation. Relating those facts in the presence of the state would violate counsels' ethical obligation to maintain the confidences and secrets of their client, as well as Mr. Lonchar's constitutional and statutory rights to make such presentations on an *ex parte* basis. Counsel are preparing a sealed proffer of those facts, and a motion to reconsider the Court's ruling on that issue.

stopped vacillating—just 32 minutes before his scheduled execution he authorized the filing of a habeas petition in his own name. Because the claims in Mr. Lonchar's habeas petition had never been presented to the habeas court, Mr. Lonchar was able to secure a stay of execution from the Superior Court of Butts County and put a stop to the state's attempts to execute him.

Unfortunately, if this Court dismisses Mr. Lonchar's current petition with prejudice, a subsequent decision by Mr. Lonchar to resume his appeals may fall on deaf ears, and Mr. Lonchar may be executed because of a decision made while he made incompetent and acting under state-sponsored duress.<sup>5</sup> If Mr. Lonchar were to change his mind 32 minutes before his next execution date, this Court would no longer have jurisdiction over the current petition. Under those circumstances, Mr. Lonchar would be forced to file a petition for writ of habeas corpus in the United States District Court. The state would predictably argue that all of the claims raised in Mr. Lonchar's state petition were procedurally defaulted, and could not be considered by the federal court. With no evidentiary record, and Mr. Lonchar's meritorious claims procedurally defaulted (including ineffective assistance by the attorney who prepared his direct appeal), the federal court could only consider federal constitutional claims raised by Mr. Lonchar's direct appeal counsel. In essence, Mr. Lonchar would be deprived of *any* post-conviction review of claims on which he is *clearly* entitled to relief, merely because he made an incompetent and involuntary decision to forego his state habeas remedies.

In *Pate v. Robinson*, 383 U.S. 375, 384, 86 S.Ct. 836, 841 (1966), the United States Supreme Court dealt with an analogous issue where the state argued that a mentally

<sup>5</sup> The Georgia Supreme Court has held as a matter of law that a person under a death sentence who refuses to appeal is "utterly incompetent mentally." *Sims v. balkcom*, 220 Ga. 7, 13, 136 S.E. 2d 766, 770 (1965).

ill defendant had deliberately waived his right to a determination of sanity. Dispensing with the State's argument, the Court observed that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.* In this case, the dismissal of Mr. Lonchar's habeas petition with prejudice (in the absence of any determination of voluntariness and competency) threatens to bring about a similarly incongruous result: the waiver of substantial rights, including a challenge to his competency to stand trial, by one who is in fact incompetent.

### III. This Court Should Not Dismiss Mr. Lonchar's Petition With Prejudice Without Conducting a Hearing on the Voluntariness and Competence Issues.

At the June 23, 1994 hearing, counsel requested that the Court withhold ruling on Mr. Lonchar's current request to die until an evidentiary hearing could be held on Mr. Lonchar's competence to make the decision to drop his appeals, and the voluntariness of that decision. See *Whitmore v. Arkansas*, 110 S.Ct. 1717 (1990). The Court rejected counsel's request for a hearing, and indicated its intention to allow Mr. Lonchar to dismiss his petition without any reliable inquiry into the mental and physical conditions which have compelled Mr. Lonchar to seek his own destruction. If the Court were to hold the hearing requested by counsel, counsel could demonstrate that Mr. Lonchar's mental illness renders him incompetent to make the decision to dismiss his habeas petition, and that Mr. Lonchar's decision to drop his appeals is motivated by his mental illness and the coercive effect of his treatment in the Georgia prison system. While counsel sought to provide this Court with information on the issues of competence and voluntariness which is protected by counsel's ethical obligation to preserve the confidence and secrets of a client, the Court rejected counsel's request to present this information *in camera* and *ex*



*parte*.<sup>6</sup> Given the consequences of a dismissal with prejudice for any subsequent attempt by Mr. Lonchar to pursue these claims and save his life, this Court should not take such a drastic step without conducting a full evidentiary hearing on the voluntariness and competence issues.

WHEREFORE, counsel for Mr. Lonchar respectfully request that any order by this Court dismissing his habeas petition specifically state that it is without prejudice to Mr. Lonchar re-filing this petition and once again invoking the jurisdiction of the Court over the issues presented in the petition.

Respectfully submitted,

/s/ Clive Stafford Smith  
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/s/ Stephen C. Bayliss  
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<sup>6</sup> Respondent evidently also harbors doubts about the seriousness of Mr. Lonchar's current wish to die, having argued for a dismissal without prejudice. If Respondent were convinced that Mr. Lonchar was serious about going through with his execution *this time*, Respondent would have no objection to the dismissal of the petition without prejudice.

IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

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[Title Omitted in Printing]

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RESPONSE TO COUNSEL'S BRIEF IN OPPOSITION  
TO DISMISSAL WITH PREJUDICE

COMES NOW Walter D. Zant, Respondent in the above-styled action, by counsel, Michael J. Bowers, Attorney General for the State of Georgia, and submits this response to the brief in opposition to dismissal with prejudice filed by Mr. Stafford Smith and Mr. Bayliss. Respondent would note that neither individual is any longer representing Mr. Lonchar as he clearly dismissed them at the hearing on June 23, 1994. The purpose of these briefs is to discuss the question of whether the dismissal of Mr. Lonchar's petition should be with or without prejudice. The brief in opposition cites no case or statute that would prohibit such a dismissal.

Ironically, the brief purports to rely on a case from the Supreme Court of Georgia for the proposition that dismissal or failure to file an appeal in a capital case is a reflection of incompetency. *Sims v. Balkcom*, 220 Ga. 7, 13, 136 S.E.2d 766, 770 (1965). A review of that case shows that the court also held that imposing a death sentence on someone for the offense of rape when the victim did not die was not cruel and unusual punishment. Clearly, the case is outdated in both respects. The Georgia Supreme Court in Mr. Lonchar's case has held to the contrary, ruling that a competent individual may decide not to pursue appeals in the face of a death sentence.

Neither *Whitmore v. Arkansas*, 495 U.S. 149 (1990), nor *Pate v. Robinson*, 383 U.S. 375 (1966), support the

proposition that this Court cannot dismiss this habeas corpus action with prejudice. The Court in *Whitmore* was discussing the waiver of a direct appeal, not the dismissal of a post-conviction civil-type proceeding. In *Pate*, the Court was addressing competency to stand trial in the original criminal trial setting.

In reviewing Georgia law, however, it appears that it is unclear whether a dismissal with prejudice would be appropriate under the circumstances of this case. Although the Civil Practice Act does not apply in its entirety to habeas corpus actions, the rules set forth therein provide some guidance. O.C.G.A. § 9-11-41 provides rules for dismissals of actions and states that a plaintiff may dismiss an action without prejudice "without order or permission of court, by filing a written notice of dismissal at any time before the plaintiff rests his case." Under that rule, the hearing on June 23, 1994, was unnecessary and Mr. Lonchar could have dismissed the petition simply by filing a written notice. Cases to refer to instances in which there would be prejudice to the defendant, but again, do not relate to the situation before the court.

Respondent's concern is that the judicial system not be abused. Even if this petition is dismissed without prejudice, if Mr. Lonchar decides to file a new petition, there would be questions raised about the appropriateness of that action. Due to the ambiguity in the case and statutory law, however, it would appear that the prudent course of action would be to simply dismiss this action, not provide that the dismissal is with prejudice and, if necessary, allow subsequent courts to determine the effect of that dismissal on Mr. Lonchar's ability to pursue a state habeas corpus remedy. Respondent does not want to inject an issue into this case which could simply result in additional litigation and, therefore, will not insist that the dismissal be with prejudice.

## CONCLUSION

WHEREFORE, Respondent prays that this Court allow Mr. Lonchar to dismiss the petition, vacate the stay of execution and decline to allow any further pleadings to be filed by Mr. Stafford Smith and Mr. Bayliss as they are no longer counsel for Mr. Lonchar and as he has the absolute right to dismiss them and the petition.

Respectfully submitted,

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Attorney General

/s/ Susan V. Boleyn  
SUSAN V. BOLEYN 065850  
Senior Assistant Attorney General

/s/ Mary Beth Westmoreland  
MARY BETH WESTMORELAND 750150  
Senior Assistant Attorney General

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[Filed Jun. 13, 1995]

IN THE SUPERIOR COURT OF DEKALB COUNTY  
STATE OF GEORGIA

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Case No. 86-CR-3747  
Murder

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STATE OF GEORGIA,

vs.

LARRY GRANT LONCHAR,  
*Defendant.*

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**MOTION TO DISQUALIFY JUDGE**

Comes Now Milan Lonchar, Jr., as next-friend to Larry Lonchar, and respectfully moves to disqualify Judge Robert J. Castellani from any proceedings in this matter. In support thereof, movant shows the following: <sup>1</sup>

1. Larry Grant Lonchar is scheduled to be executed by the State of Georgia at 3:00 P.M. on June 23, 1995, pursuant to an execution order signed by Judge Robert J. Castellani on June 7, 1995.

2. On February 24, 1993, Larry Lonchar was scheduled to be executed by the State of Georgia at 7:00 P.M., pursuant to an order signed by Judge Castellani on February 5, 1993. The day of the scheduled execution, Mr.

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<sup>1</sup> The factual allegations made in this motion are based upon the knowledge and belief of the undersigned counsel, and upon the facts set forth in the affidavit of Stephen C. Bayliss, Esq. which is attached to this Motion and is labeled "Exhibit A".

Lonchar was spending his last remaining hours with family, friends and spiritual counselors. At approximately noon on that day, Judge Castellani appeared at the prison. Judge Castellani did not sign in at the visitor's desk, but was immediately ushered into the visitation room with Mr. Lonchar. At the time of Judge Castellani's arrival, Mr. Lonchar was visiting with his brother Milan and his father. Mr. Lonchar had not requested that Judge Castellani visit him, and both Mr. Lonchar and his family were surprised by his sudden appearance. Mr. Lonchar's family was angered and offended by Judge Castellani's request to speak with Mr. Lonchar in private. The unannounced and uninvited intrusion of the Judge who had condemned Mr. Lonchar to death was affront to the dignity of the distraught family. Judge Castellani spent approximately twenty minutes speaking with Mr. Lonchar, then departed the prison without a word to the family or friends who had gathered there. At 6:28 p.m., less than six hours after Judge Castellani's visit, Mr. Lonchar informed the prison that he wished to speak with his lawyers and have his execution stopped.

3. Undersigned counsel wrote to Judge Castellani on July 1994 and advised the Court of his potential involvement in this matter as counsel for Mr. Lonchar's next-friend, his brother Milan Lonchar, Jr. In that letter, counsel referred to Judge Castellani's January 24, 1993 visit with Mr. Lonchar, and the Judge's personal awareness of Mr. Lonchar's volatility and mental instability, and requested an opportunity to be heard before Judge Castellani took any further action in the case. On July 6, 1994, counsel for Respondent wrote to Judge Castellani in reply, stating her position that no hearing was necessary under the circumstances of the case, and that Judge Castellani could set an execution date without notice or hearing. Judge Castellani replied to undersigned counsel on July 6, 1994, stating that he was sending a copy of counsel's letter

to Mr. Lonchar, and directing counsel to copy Mr. Lonchar on any further correspondence to the Judge.<sup>2</sup>

4. On June 8, 1995, Judge Castellani's execution order was filed in the Superior Court of DeKalb County, and a copy was received by undersigned counsel late in the afternoon of June 8, 1995. This motion is brought within five days of counsel becoming aware that Judge Castellani has continued to act in his official capacity in this action, despite the grounds for disqualification. See Unif.Sup.Ct. R. 25.1.<sup>3</sup>

<sup>2</sup> The Judge's direction that counsel copy Mr. Lonchar on any correspondence is ironic in light of the numerous letters which Judge Castellani has, upon information and belief, exchanged with Mr. Lonchar and with counsel for Respondent, without copying undersigned counsel or the counsel handling Mr. Lonchar's habeas petition. See, Code of Judicial Conduct, Canon 3(B)(7) ("Judges shall not initiate or consider *ex parte* communications . . .").

<sup>3</sup> In a response to undersigned counsel's request for voluntary recusal (attached hereto as "Exhibit B"), Senior Assistant Attorney General Mary Beth Westmoreland has argued that the undersigned counsel has no standing to seek the court's voluntary recusal, or to file a motion to disqualify Judge Castellani. See Letter of Mary Beth Westmoreland, attached hereto as "Exhibit C". The Code of Judicial Conduct and the relevant case law are clear, however, that the duty to disclose on the record any circumstances that may give rise to questions about his impartiality or propriety, and the concurrent duty to disqualify, rest with the judge. See, e.g., *United States v. Murphy*, 768 F.2d 1518, 1537 (7th Cir. 1985); *United States v. Amerline*, 411 F.2d 1130, 1134 (6th Cir. 1969) ("the duty to disqualify is placed solely upon the District Judge"); Code of Judicial Conduct, Canon 3(E)(1) ("Judges *shall disqualify themselves* in any proceeding in which their impartiality might reasonably be questions . . .") (emphasis added); *King v. State*, 246 Ga. 386, 271 S.E.2d 630, 633 (1980). Thus, a judge is required to disqualify himself if his action on the case might create an appearance of impropriety, regardless of whether the parties are aware of the basis for recusal.

I. JUDGE CASTELLANI'S FEBRUARY 1993 PRE-EXECUTION VISIT AND SUBSEQUENT *EX PARTE* COMMUNICATIONS WITH MR. LONCHAR AND COUNSEL FOR THE STATE RAISES AT LEAST AN APPEARANCE OF IMPROPRIETY WHICH REQUIRED HIS DISQUALIFICATION FROM THIS MATTER.

5. The Code of Judicial Conduct was established to press the integrity of the judiciary and insure public confidence in the fairness and propriety of the judicial process. Canon 2 of the Code requires that a judge "conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." In so doing, a judge "must avoid all impropriety and appearance of impropriety." Code of Judicial Conduct, Canon 2, Commentary. "It is not necessary that there be shown 'any actual impropriety on the part of the trial court judge. The fact that his impartiality might reasonably be questioned suffices for his disqualification.'" *Birt v. State*, 256 Ga. 483, 350 S.E.2d 241, 243 (1986) (quoting *King v. State*, 246 Ga. 386, 390, 271 S.E.2d 630, 634 (1980)).

6. The ethical obligations of the Code are broadly applicable and self-executing. Thus, the Code notes that "the prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge." Canon 2(A) Commentary. Judges are obligated to adhere to the responsibilities of the Code and police their own conduct, and to disqualify themselves whenever an appearance of impropriety or partiality might be inferred from the circumstances. Canon 1 ("Judges shall participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe such standards of conduct so that the integrity and independence of the judiciary may be preserved"). As the caselaw makes clear, a judge has a "personal duty" to disclose on the



record any circumstances that may give rise to questions about his impartiality or propriety. *United States v. Murphy*, 768 F.2d 1518, 1537 (7th Cir. 1985); *United States v. Amerline*, 411 F.2d 1130, 1134 (6th Cir. 1969) ("the duty to disqualify is placed solely upon the District Judge"); Code of Judicial Conduct, Canon 3(E) (1) ("Judges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned. . .") (emphasis added); *King v. State*, 246 Ga. 386, 390, 271 S.E.2d 630, 634 (1980).

7. Judge Castellani's February 24, 1993 visit with Mr. Lonchar raised an appearance of impropriety which required his disqualification from any further action in this matter. While the content of the secret consultation is known only to Judge Castellani and Mr. Lonchar, an appearance of impropriety was created by the mere fact that such a meeting occurred under these circumstances.<sup>4</sup> Mr. Lonchar's family, friends, and spiritual counselors were offended by the appearance of Judge Castellani at the prison. The spontaneous and secretive nature of the visit—no appointment was made for the visit, Judge Castellani was not on Mr. Lonchar's approved visitor list and did not sign in on the prison visitation logs, and Mr. Lonchar did not invite Judge Castellani to visit—enhances the appearance of impropriety. Moreover, in the

<sup>4</sup> It is possible that the content of the secret consultation constituted an actual impropriety. For example, If Judge Castellani gave Mr. Lonchar legal advice with respect to abandoning or pursuing his appeals, the Code provisions prohibiting judges from the practice of law would have been violated. See, e.g., *Scogin v. State*, 138 Ga.App. 859, 227 S.E.2d 780, 781 (1976). If Judge Castellani attempted to impose or convey his religious beliefs to Mr. Lonchar, implicating the constitutional separation of church and state, disqualification may have been mandated by Canon 2 (judges must "respect and comply with the law") and Canon 3(B)(5) (judge shall not manifest bias or prejudice based upon religion). A hearing is thus necessary to establish the content of the conversation between Judge Castellani and Mr. Lonchar, and to determine whether any actual impropriety occurred.

context of the dramatic events of that evening—Mr. Lonchar's last-minute change of course and the immediate deterioration of his mental condition—the meeting raises serious questions about Judge Castellani's independence and impartiality as well as the propriety of his actions in this case.

8. Upon information and belief, Judge Castellani and Mr. Lonchar have regularly corresponded with each other by mail. None of these letters have been made a part of the public record in the case, nor have they been disclosed to undersigned counsel of the attorneys handling Mr. Lonchar's habeas petition. The content of these letters, which have presumably been retained by Judge Castellani in his own files, may reveal additional impropriety or evidence relating to the competency and voluntariness issues. In any event, all of these letters should have been disclosed to counsel for Mr. Lonchar; if they relate to Mr. Lonchar's decision to waive his appeals, they should also have been disclosed to undersigned counsel. A hearing is clearly necessary to examine these letters and their effect of the issue of Judge Castellani's disqualification, as well as on the issues of competency and voluntariness.

9. Upon information and belief, Judge Castellani and counsel for Respondent and the State have communicated regarding the status of Mr. Lonchar's case and the setting of an execution date. With the exception of Ms. Westmoreland's July 6, 1994 letter to Judge Castellani, these *ex parte* communications have not been disclosed to counsel on Mr. Lonchar's habeas petition or to next-friend counsel. Once again, a hearing is needed to establish the content of these communications and determine whether they require the disqualification of Judge Castellani or other appropriate sanctions.<sup>5</sup>

<sup>5</sup> *Ex parte* communications between counsel for the Warden and the State and Judge Castellani, in apparent violation of Unif.Sup. Ct.R. 4.1, may also warrant their disqualification from this matter.

10. In addition, Judge Castellani's personal experience with Mr. Lonchar's volatile and unstable mental condition, including their meeting just hours before Mr. Lonchar acted to pursue the appeals which would save his life, may necessitate Judge Castellani's appearance as a witness in next-friend proceedings relating to Mr. Lonchar's competency. While a hearing is necessary to establish the content of the February 24, 1993 meeting between Judge Castellani and Mr. Lonchar and any subsequent communications, it is certainly possible that Mr. Lonchar has communicated the coercive nature of the prison conditions, his mental illness, and the other factors which render him incompetent and his decision involuntary.

**II. DUE PROCESS AND THE EIGHTH AMENDMENT ARE VIOLATED BY THE SETTING OF AN EXECUTION DATE BY A DISQUALIFIED JUDGE, WITHOUT NOTICE OR HEARING AND BASED UPON THE JUDGE'S INDEPENDENT FACTUAL INVESTIGATION AND EX PARTE COMMUNICATIONS WITH THE STATE.**

11. As alleged above, the Code of Judicial Conduct mandates that Judge Castellani disqualify himself from acting in this matter because of: 1) the impropriety or appearance of impropriety arising from his uninvited, unannounced private consultation with Mr. Lonchar just hours before Mr. Lonchar was due to be executed; 2) the impropriety or appearance of impropriety in Judge Castellani's subsequent communications with Mr. Lonchar and/or counsel for Mr. Lonchar's next-friend; and 3) the foreseeable possibility that Judge Castellani may be required to give testimony as to Mr. Lonchar's volatile and unstable mental condition, based upon his extensive personal contact with Mr. Lonchar. Under these circumstances, the entry of an execution order by a dis-

qualified judge without notice or hearing violates the Eighth and Fourteenth Amendments to the United States Constitution. See, e.g., *Mendenhall v. Hopper*, 453 F. Supp. 977, 983 (S.D.Ga. 1978), *aff'd*, 591 F.2d 1342 (5th Cir. 1979); *Ford v. Wainwright*, 106 S.Ct. 2595 (1986); *Gardner v. Florida*, 430 U.S. 349 (1977).

12. Due process is required in any judicial proceeding preceding the imposition of the death penalty. *Ford v. Wainwright*, 106 S.Ct. 2595 (1986). As Justice Marshall pointed out in *Ford*,

Although the condemned prisoner does not enjoy the same presumptions accorded to a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether; if the Constitution renders the fact *or timing of his execution* upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being.

*Ford*, 106 S.Ct. at 2602-03. In this instance, due process was violated in a number of distinct ways.

13. First, the failure of Judge Castellani to disqualify himself where valid grounds for recusal exist was a denial of due process. *Mendenhall v. Hopper*, 453 F.Supp. 977, 983 (S.D.Ga. 1978), *aff'd*, 591 F.2d 1342 (5th Cir. 1979); *United States v. Denno*, 313 F.2d 364, 374 (2d Cir. 1963).

14. Second, the denial of notice and a hearing prior to setting of the date was a denial of due process. Notwithstanding the Supreme Court's longstanding pronouncement that "[t]he fundamental requirement of due process of law is the opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385, 394 (1914), the practice of setting the execution date in this case did not permit any material relevant to the ultimate decision to be submitted on behalf of the prisoner facing execution. See *Ford*,



106 S.Ct. at 2603-04 ("It would be odd were we now to abandon our insistence upon unfettered presentation of relevant information, before the final fact antecedent to execution has been found.").

15. A related constitutional flaw in the practice follow in this case was the denial of any opportunity to challenge the facts upon which the court based its decision to issue the execution order. *See Ford*, 106 S.Ct. at 2604.<sup>6</sup> Judge Castellani's remarkable pre-execution visit with Mr. Lonchar and his subsequent non-public, *ex parte* communication with Mr. Lonchar amounted to *ex parte* judicial investigation and factfinding, in violation of the Code of Judicial Conduct, due process, and the Eighth Amendment. *See* Code of Judicial Conduct, Canon 3(B)(7) Commentary ("Judges must not independently investigate facts in a case"); *Gardner v. Florida*, 430 U.S. 349 (1977). Similarly, Judge Castellani's *ex parte* communication with counsel for the Warden and the State presumably contributed to the finding of predicate facts and the exercise of judicial discretion in the absence of any opportunity for interested parties to confront or test the reliability of the facts, address the equities, or raise additional issues. *Id.*

16. Thus, Judge Castellani's pre-execution visit with Mr. Lonchar and subsequent *ex parte* communications with Mr. Lonchar and counsel for the Warden and the State not only created an appearance of impropriety in violation of the Code of Judicial Conduct, but also violated due process and Eighth Amendment requirements for judicial action preceding the execution of Mr. Lonchar.

<sup>6</sup> Of course, the issue of Judge Castellani's recusal could have been raised and resolved at such a hearing, obviating this motion and the motion to vacate the void execution order. Thus, the responsibility for any delay which may be caused by the recusal of Judge Castellani and the vacatur of his order lies with the Judge, not the movant.

17. Ms. Westmoreland's argument that the setting of an execution date is an "administrative duty" with no due process requirement is disposed of by the clear holding of *Ford v. Wainwright* that due process must be provided in any action preceding the imposition of the death penalty which relates to "the fact or timing of [an] execution." *Ford*, 106 S.Ct. at 2602-03; *see also, Ford*, 106 S.Ct. at 2610 (Powell, J. concurring) (due process required in determination "whether" or "when" execution may take place).

### CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, undersigned counsel respectfully requests:

- 1) that Judge Robert J. Castellani recuse himself from all action in this case, and that another judge be appointed to handle this case;
- 2) that the Court grant an evidentiary hearing at which proof may be offered concerning the allegations contained herein;
- 3) that funds be afforded as necessary to secure the attendance of witnesses and the production of evidence necessary to prove the allegations made herein, and to investigate any additional grounds for recusal which may exist.

Respectfully submitted,

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FAX (404) 853-4193  
Attorney for Milan Lonchar, Jr.

## "EXHIBIT A"

COUNTY OF FULTON    )  
                               )  
 STATE OF GEORGIA    )

## AFFIDAVIT OF STEPHEN C. BAYLISS

Comes now Stephen C. Bayliss before the undersigned official duty authorized to administer oaths, and swears and states as follows:

1. I am above the age of eighteen and competent to testify to the matters set forth herein. I am an attorney licensed to practice law in the State of Georgia. I am employed by the Georgia Resource Center, 1375 Peachtree Street, Suite 276, Atlanta, Georgia 30309.

2. On February 24, 1993, I spent much of the day at the Georgia Diagnostic and Classification Center in Jackson, Georgia. Larry Lonchar was scheduled to be executed at 7:00 p.m., and I was at the prison to visit with Mr. Lonchar, provide assistance to the family and friends gathered to visit with him, and to provide Mr. Lonchar with legal assistance if he expressed a desire to have his execution stopped. I had worked with Mr. Lonchar and the prison staff on preparing the list of visitors approved to visit with him during the death watch period.

3. At approximately 12:30 p.m., I returned to the prison after a brief errand. As I was walking down the long hallway to the visitation desk of the prison, I passed Judge Robert J. Castellani as he was leaving the prison, who I knew to be the trial judge who had sentenced Mr. Lonchar to death. When I arrived at the visitation desk, I asked the visitation officer if Judge Castellani had made an appointment to come to see Mr. Lonchar, and if he had signed in. To the best of my recollection, the visitation officer indicated "no" to both questions.

4. When I proceeded into the visitation waiting area, I was told by several of the visitors that Judge Castellani had been in to see Larry. I spoke with Larry's brother

Milan, who told me that he and his father had been visiting with Larry when Judge Castellani was allowed into the visitation room. Milan expressed his anger and resentment that the judge who had condemned his brother to death had interrupted his visit with Larry, who was scheduled to be electrocuted in a few short hours. Milan said that he couldn't believe that the judge showed such lack of respect for the family's last terrible hours with Larry. Milan said that Judge Castellani and Larry had walked to one end of the visiting room and talked for about twenty minutes. Milan told me that Judge Castellani left the visiting room without saying a word to him or Larry's father.

5. At approximately 6:30 p.m., Mr. Lonchar expressed a desire to talk to with his lawyers, and Clive Stafford Smith spoke to Mr. Lonchar. Mr. Lonchar asked Mr. Stafford Smith to stop the execution and file a habeas petition on his behalf. Shortly thereafter, Judge Hal Craig signed an order staying Mr. Lonchar's execution.

6. Since that time, I have spoken with Mr. Lonchar's mother, father, and brothers many times about their visits with Mr. Lonchar. They have informed me that Mr. Lonchar has frequently referred to letters he had written to Judge Castellani and Ms. Westmoreland, counsel for the Warden, and letters that he had received from them. I have not seen any of the letters exchanged between Judge Castellani and Mr. Lonchar. Several letters written by Mr. Lonchar to Ms. Westmoreland were served on me by Ms. Westmoreland in the context of the habeas petition Mr. Stafford Smith and I were handling. I do not know whether Ms. Westmoreland and Mr. Lonchar have exchanged any additional letters.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Stephen C. Bayliss  
 STEPHEN C. BAYLISS

[Notary Omitted in Printing]



IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

Habeas Corpus No. \_\_\_\_\_

MILAN LONCHAR, JR., as Next-Friend to Larry Lonchar,  
*Petitioner,*

vs.

ALBERT G. THOMAS, Warden,  
Georgia Diagnostic and Classification Center,  
*Respondent.*

**PETITION FOR WRIT OF HABEAS CORPUS**

MILAN LONCHAR, JR., as next friend to Larry Lonchar, petitions this Court for a Writ of Habeas Corpus, pursuant to O.C.G.A. §§ 9-14-41 *et seq.* Respondent is the Warden of the Georgia Diagnostic and Classification Center in Jackson, Georgia. The allegations of this petition are set forth as follows:

**I. HISTORY OF PRIOR PROCEEDINGS**

(1) The name and location of the court which entered the judgment of conviction and sentence under attack are:

Superior Court of DeKalb County  
Decatur, Georgia

(2) The date of the judgment of conviction was June 25, 1987. Petitioner was absent during his trial and during significant portions of his sentencing proceeding.

(3) The date of the judgment of sentence was June 27, 1987; the sentence was that Petitioner be put to death by electrocution for the crime of murder.

(4) The nature of the offense involved is that Petitioner was convicted of murder, in violation of O.C.G.A. § 16-5-1.

(5) At his trial, Petitioner pled not guilty.

(6) The trial on the issue of guilt or innocence and on the issue of sentence was had before a jury.

(7) Petitioner did not testify at the guilt/innocence trial. Petitioner did not testify at the penalty phase of the trial. In fact, Petitioner did not attend almost all of the proceedings.

(8) Petitioner's case was heard upon automatic appeal to the Georgia Supreme Court. The facts of Petitioner's appeal are as follows:

a. On July 13, 1988, the Supreme Court of Georgia affirmed Petitioner's conviction and sentence. *Lonchar v. State*, 258 Ga. 447, 369 S.E.2d 749 (1988). Rehearing was denied on July 31, 1988.

b. On January 9, 1989, the Supreme Court of the United States, with Justices Brennan and Marshall dissenting, denied a Petition for Writ of Certiorari filed on Petitioner's behalf. *Lonchar v. Georgia*, — U.S. —, 109 S.Ct. 818 (1989). A timely-filed Petition for Rehearing was denied on February 27, 1989. *Lonchar v. Georgia*, — U.S. —, 109 S.Ct. 1332 (1989).

(9) On March 8, 1990, the Superior Court of DeKalb County ordered that Petitioner's sentence of death be carried out between noon March 23, 1990, and noon on March 30, 1990.

(10) On March 14, 1990, the trial court refused to vacate his order, and transferred various questions to this Court for consideration. On March 20, 1990, the Supreme Court dismissed a motion to stay Petitioner's execution as premature, referring it also to this Court for consideration.

(11) On March 21, 1990, Petitioner, by next friend, filed a petition for writ of habeas corpus in this Court.

(12) After a limited hearing, the Court found Larry Lonchar to be competent in an order entered March 29, 1990, and granted the state's motion to dismiss the next friend Petition. The Supreme Court of Georgia entered a stay pending disposition of Petitioner's application for a certificate of probable cause that same day. On May 2, 1990, the Court denied the application. Seven days later, the trial court set an execution date which the Supreme Court of Georgia again stayed, since the time for rehearing had not yet passed. The petition for rehearing was subsequently denied on May 23, 1990.

(13) Petitioner timely filed a petition for writ of certiorari, by next friend, in the United States Supreme Court on or about June 11, 1990. That petition was denied October 9, 1990. *Kellogg v. Zant*, 111 S.Ct. 231 (1990).

(14) On October 23, 1990, a next friend Petition for Writ of Habeas Corpus was filed in the United States District Court for the Northern District of Georgia. A hearing was held on Respondent's motion to dismiss on November 12-14, 1991. The District Court found Mr. Lonchar to be competent, and granted Respondent's motion to dismiss, in an order entered on February 18, 1992.

(15) Petitioner filed a notice of appeal and motion for certificate of probable cause to appeal on February 20, 1992. The motion was granted on March 12, 1992, and an appeal was taken to the United States Court of Appeals for the Eleventh Circuit.

(16) Oral argument in the Court of Appeals was held on October 6, 1992. On November 13, 1992, the Court of Appeals affirmed the District Court's ruling. *Lonchar v. Zant*, 978 F.2d 637 (11th Cir. 1992). A timely-filed Petition for Rehearing was denied on January 12, 1993.

(17) On or about February 2, 1993, Petitioner filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

(18) On February 5, 1993, the trial court signed an execution order, scheduling Mr. Lonchar's execution for February 24, 1993.

(19) On or about February 5, 1993, Petitioner filed a motion for stay of execution in the Georgia Supreme Court. On or about February 13, 1993, the Georgia Supreme Court denied the motion for stay of execution.

(20) On or about February 16, 1993, Petitioner filed a Motion for Stay of Execution in the United States Supreme Court. On February 24, 1993, the Supreme Court denied the motion for stay or execution and the petition for writ of certiorari.

(21) On February 24, 1993, thirty-two minutes before he was scheduled to be put to death by electrocution, Mr. Lonchar informed counsel that he wished to stop the execution and pursue a habeas petition. The Superior Court of Butts County, Judge Hal Craig presiding, granted the request for a stay of execution, and Mr. Lonchar's petition for writ of habeas corpus was filed by the Clerk of Superior Court. Mr. Lonchar's case proceeded with his full cooperation for the next several months.

(22) By May 1993, however, Mr. Lonchar's mental condition had seriously deteriorated once again, and he attempted suicide by slashing his wrist with a sharp object. Shortly thereafter, Mr. Lonchar notified the court that he wished to dismiss the habeas petition he had filed in February 1993.

(23) The Superior Court, Judge Kristina Cook Connelly presiding, conducted a brief hearing on June 25, 1994 to permit Mr. Lonchar to address the court on the issue. After Mr. Lonchar stated his desire to dismiss the petition, the court asked counsel to respond. Counsel for Mr. Lonchar noted that Mr. Lonchar had not been evaluated for competency since October 1991 and that a number of intervening events had occurred which cast doubt upon Mr. Lonchar's current competency to dismiss



his habeas petition. Counsel requested that the court conduct an evidentiary hearing on the competency and voluntariness issues before ruling on Mr. Lonchar's request. Respondent argued that the competency issue was not before the court, and also urged the court to rely upon the previous determinations of competency in acquiescing to Mr. Lonchar's request. The court refused to conduct an evidentiary hearing on the competency issue, and failed to make any findings of fact or law with regard to Mr. Lonchar's competency to dismiss his petition, or the voluntariness of that decision.

(24) In a summary order filed on January 16, 1995, the court dismissed Mr. Lonchar's petition. On February 13, 1995, counsel filed a motion to reconsider, and a motion for leave to file an *ex parte* proffer of privileged information respecting Mr. Lonchar's competency. The court refused to consider the motions, and denied them in an order dated February 23, 1995.

(25) Petitioner filed a notice of appeal and an application for certificate of probable cause to appeal in the Georgia Supreme Court on February 24, 1995. On April 6, 1995, the Georgia Supreme Court denied the application. Petitioner filed a motion for reconsideration on April 17, 1995, which was denied on May 4, 1995.

(26) On June 9, 1995, the Superior Court of DeKalb County, Judge Robert Castellani presiding, signed an order setting Petitioner's execution for the period between noon on June 23, 1995 and noon on June 30, 1995.

## II. MILAN LONCHAR, JR. AS NEXT FRIEND

Mr. Lonchar has a right to seek further review of his convictions and death sentences pursuant to state and federal habeas corpus proceedings. Ga.Const. art 1, § 1, ¶ 15 (1983); O.C.G.A. § 9-14-42 *et seq.*, 28 U.S.C. § 2254. If he is not competent to pursue state remedies, *Gilmore v. Utah*, 429 U.S. 1012 (1976); *Lenhard v.*

*Wolff*, 100 S.Ct. 3 (1979), or federal remedies, *Rees v. Peyton*, 384 U.S. 312, 313 (1966), then a "next friend" may properly pursue those remedies in his stead. *Id.*, see also *Rumbaugh v. Procnier*, 753 F.2d 395 (5th Cir. 1985).

Mr. Lonchar's brother appears here as next friend. He and other family members have visited with Mr. Lonchar numerous times over the past several months. Since January 14, 1994, Mr. Lonchar has been visited by Dr. Dennis Herendeen, a licensed psychologist, on nine separate occasions for at least one or two hours. Based upon the available background material and other evidence and based upon his extensive experience with Mr. Lonchar over the past year and a half, Dr. Herendeen has concluded that Mr. Lonchar is incompetent to waive his appeals, and that it is imperative that he be thoroughly evaluated. Affidavit of Dennis Herendeen, Ph.D. (attached hereto as Exhibit A); Supplemental Affidavit of Dennis Herendeen, Ph.D. (attached hereto as Exhibit B). It is clear under the standards announced by the United States Supreme Court that there is a serious question of Mr. Lonchar's competency to waive his state and federal rights, and that a stay of execution is necessary in order to properly address the issue. Specifically, it is clear that Mr. Lonchar does not currently have "the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation," and that "he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Rees v. Peyton*, 384 U.S. 312, 314 (1966). The question of Mr. Lonchar's competence is of "prime importance," *id.*, 384 U.S. at 314, and his execution cannot be countenanced under these circumstances.

For several reasons, previous evaluations of Mr. Lonchar's mental condition cannot be relied upon with respect to the assessment of Mr. Lonchar's current mental competency to waive his appeals. First, the last evaluation of

Mr. Lonchar's competency occurred over three and one-half years ago. Dr. Dave M. Davis, the psychiatrist who conducted that evaluation, states in a sworn affidavit that his October 1991 evaluation cannot be relied upon:

It is my professional opinion that my previous evaluation of Mr. Lonchar's competency cannot be relied upon as a valid assessment of his current competency to waive his appeals, and that a new evaluation is warranted. It has been over three years since I last evaluated Mr. Lonchar. Under the prevailing professional standards of practice with respect to forensic psychiatric evaluations, the extended period of time since my last evaluation of Mr. Lonchar undermines confidence in its accuracy as an indicator of Mr. Lonchar's current mental status. In addition, intervening events in this case which bear on the issue of Mr. Lonchar's competency—including Mr. Lonchar's apparent change of heart on the eve of his execution, his subsequent suicide attempt, and his apparent renewed desire to forego his appeals and be executed—require a thorough psychiatric evaluation to establish whether Mr. Lonchar is currently competent to waive his appeals.

Affidavit of Dave M. Davis, M.D (attached hereto as Exhibit C).

The "intervening events" which Dr. Davis believes affect Mr. Lonchar's competency bear additional scrutiny. The "firm and unwavering" desire to waive appeals and be executed, which several courts have relied upon in finding Mr. Lonchar competent, *see*, 2/18/92 District Court Order at 12; *Kellogg v. Zant*, 260 Ga. 182, 390 S.E.2d 839, 840 n.1 (1990), clearly is no longer an accurate description of Mr. Lonchar's history. On February 24, 1993, thirty minutes before he was scheduled to be executed, Mr. Lonchar asked his lawyer to seek a stay of execution and pursue his habeas appeals. Immediately after signing

the necessary papers, Mr. Lonchar's mental condition deteriorated significantly, and he was placed on suicide watch by prison staff.

Three months later, Mr. Lonchar's mental illness reached a head and he attempted suicide by slashing his wrist with a sharp object. The suicide attempt was unsuccessful, and Mr. Lonchar's mental illness continued to worsen.

Less than two months later, Mr. Lonchar asked to drop the habeas petition he had filed in February, 1993. The Court held a hearing to inquire into Mr. Lonchar's wishes. While Mr. Lonchar demonstrated a lack of comprehension of the legal issues in his case, he stated a desire to dismiss the petition. The Court deferred to the desire expressed by Mr. Lonchar at the hearing, and on January 24, 1995, the Court dismissed Mr. Lonchar's habeas petition without prejudice. The cyclical nature of Mr. Lonchar's attitude towards his appeals (and his life) raises new and troubling concerns about his ability to make rational choices with respect to pursuing his appeals and the overwhelming effects of his mental illness upon that ability.

Since January 14, 1994, Dr. Dennis Herendeen has visited with Mr. Lonchar on nine separate occasions for at least one to two hours. Dr. Herendeen engaged in intensive psychotherapy and counselling with Mr. Lonchar. Based upon his long-term therapeutic relationship with Mr. Lonchar and his review of other evidence, Dr. Herendeen concurs with Dr. Davis that the previous evaluations should not be credited because they are outdated and because the intervening events raise new questions about Mr. Lonchar's competency. In addition, Dr. Herendeen's own experience with Mr. Lonchar sheds new light on several critical flaws in the previous competency determinations. As Dr. Herendeen states:



The insufficiency of the previous competency evaluations for the determination of Mr. Lonchar's current mental condition should be obvious. . . . First, none of Mr. Lonchar's prior evaluations made any significant exploration of Mr. Lonchar's long history of self-mutilation. This type of self-destructive behavior goes right to the heart of the question of whether or not Mr. Lonchar is fully capable of making rational choices concerning his appeals. During the course of my visits with him, there was never a time in which Mr. Lonchar did not have open wounds on his arms and body. These wounds are a result of Mr. Lonchar picking at his skin until it became a sore. This plain evidence of self-mutilation was not reported by previous evaluators.

\* \* \* \*

In addition, during the course of my relationship with Mr. Lonchar, he has revealed information that undermines the diagnoses of the state's experts. Mr. Lonchar has concealed his history of manic episodes from those evaluators, which deprived them of the information essential to a proper diagnosis. Mr. Lonchar has said that he lied to the state experts when they asked him whether he had ever had manic phases, and that he couldn't believe that they did not evaluate him in a context and environment in which his manic episodes would have been revealed to them. As a result, the conclusion of the state evaluators that bipolar disorder could be ruled out—predicated as it was on the absence of manic episodes—can no longer be credited. The manic episodes experienced by Mr. Lonchar are completely consistent with the diagnosis of bipolar disorder rendered by Dr. Phillips. The revelation, contrary to the findings of the state experts, that he has suffered from manic episodes is further evidence of his self-defeating personality traits, since he knows that the disclosure of this information "makes the case" that he is incompetent.

Based upon the sum of my experience with Mr. Lonchar and my review of materials concerning his case, it is my opinion that Mr. Lonchar is currently incompetent to waive his habeas corpus appeals, and that his decision is not voluntary. It is imperative that Mr. Lonchar receive a thorough psychological evaluation for competency and the voluntariness of his decision not to appeal his convictions and sentences of death. The prior evaluations of Mr. Lonchar's competency cannot be relied upon to establish his current competency, in light of the extended period of time since those evaluations were conducted, the many psychologically significant events which have occurred since that time, and the manifestly incorrect finding of the state experts that Mr. Lonchar had never suffered manic episodes.

#### Affidavit of Dennis Herendeen (Exhibit A).

Dr. Herendeen's testimony undermines three key aspects of the state's case for competency in the 1990-91 proceedings. His observation of Mr. Lonchar's self-mutilation over the long term of their relationship points up the inadequacy of the previous evaluations, and contradicts the United States District Court's finding of competency based upon the absence of such behavior. *See* 2/18/92 District Court Order at 12. Mr. Lonchar's suicide attempt in May 1993 removes another pillar supporting the previous adjudication of competency: that Mr. Lonchar had no history of suicide attempts. *Id.* Finally, the crux of the dispute over the proper diagnosis of Mr. Lonchar's mental illness—whether Mr. Lonchar had experienced manic episodes which would qualify him for a diagnosis of bipolar disorder—must be re-examined in light of Mr. Lonchar's revelation that he has experienced such episodes, and that he had falsely denied having such episodes when asked by the state's evaluators. Indeed, Mr. Lonchar expressed his surprise that the state's experts had failed

to evaluate him in a context and environment in which those manic episodes would have been apparent.

While Mr. Lonchar has expressed a desire to be executed, his actions have frequently been inconsistent with that goal. Thus, while Mr. Lonchar concealed his history of manic episodes from the state's experts, he has revealed the deception and the basis for his underlying mental illness to those who would use it to thwart his professed goal of state-assisted suicide. In the same vain, Mr. Lonchar has agreed to be formally evaluated by Dr. Herendeen with respect to his competency to waive habeas review, and has authorized both his own lawyers and the lawyer for his brother to seek such an evaluation. *See* Affidavit of Larry Lonchar (attached hereto as Exhibit D). Based upon this compelling evidence of Mr. Lonchar's incompetency, this next friend petition must be entertained, and a stay of execution should be entered.

### III. FACTS OF THE OFFENSE

This case involves three deaths and at least two co-defendants. Both the judge and the prosecutor acknowledged, at various points during the co-defendants' proceedings, that it was at best unclear who did what. Mr. Lonchar was tried first and received death. The co-defendant, Wells, entered a plea in return for a life sentence two days after Petitioner was sentenced to death. Uncertainty about who was responsible for what at the crime scene was never resolved, as the following excerpts reveal:

"[T]here is some question in this case as to which person killed which individuals . . . so it is important to us to get to the jury on that [conspiracy] theory."

(R. 10, prosecutor speaking to judge).

"Who fired the first shots? . . . it is unclear. Unclear, but it doesn't matter."

(R. 1231, prosecutor closing argument).

THE COURT: Let me tell you what the Court's concern is. I know that Mr. Wells' contention is. I sat through one trial of this case. I don't know, I assume all those deputies here did, too; I don't know. Anyway, given what the sentence was in the other case, I know what his contentions are, and I have got some doubts about, you know, who actually did what, based on a lot of what Dr. Burton's testimony was about what bullets did what to whom. Y'all heard the same evidence I did.

(R. 14, plea of co-defendant Wells after Petitioner's death sentence, Judge Speaking to prosecutor).

Mr. Wells statement, Your Honor, that he abandoned the enterprise, obviously this Court should take that statement with a grain of salt. Obviously he is in a position where he is going to try to minimize his losses and try to lay the blame on Larry Lonchar.

(R. 50, plea of co-defendant Wells, prosecutor speaking to Court).

The testimony of the only eyewitness at Petitioner's trial was that Petitioner entered the residence and held two of the victims at gunpoint, telling the third victim that "you had nothing to do with it." (R. 765). While the victims were being held, Wells kicked the front door in, whereupon shots were immediately fired. (R. 766). Wells shot the eyewitness, and Wells was the *only* person shooting, as far as this witness could tell. *Id.* This witness identified *three* perpetrators, and could not say that Petitioner shot anyone.

### IV. CLAIMS FOR RELIEF

Each claim for relief raised below is predicated on the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as the Georgia Constitution and on other law set forth in the Petition.



## CLAIM I.

PETITIONER'S CONVICTION AND SENTENCE MUST BE REVERSED BECAUSE THE TRIAL JUDGE FAILED TO CONDUCT A COMPETENCY HEARING WHEN THE PROCEEDINGS RAISED A BONA FIDE ISSUE RESPECTING PETITIONER'S COMPETENCY, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

The claim is evidenced by the following facts:

1. All other allegations in this petition are incorporated into this claim by specific reference.
2. Petitioner was charged with three counts of murder, and the state intended to seek the death penalty. The jury, and all the parties, were aware of the seriousness of the charges and possible penalties.
3. The circumstances surrounding Petitioner's pre-trial, trial, and sentencing proceedings should have alerted the trial judge to the necessity of a competency determination. Petitioner was suicidal, a fact he made known to the trial judge repeatedly.<sup>1</sup> The judge knew, through discovery, that Petitioner's parole officer had sought psychiatric care for him immediately before the offense. The judge also knew that Petitioner did not trust and would not cooperate with his attorney, would not speak with his attorney, and wished to stay out of the courtroom. Discussion about staying out of the courtroom raised other indicia of incompetence, which the judge ignored. As will be shown, all these circumstances "raise[d] a reason-

<sup>1</sup> Jail records from the time of Petitioner's arrest through his trial reveal that Petitioner was constantly being seen by psychiatrists and other mental health professionals, and was constantly on suicide watch. He was in need of, but refused, medication. Due to a total lack of an evidentiary hearing on the matter, it is not yet established that the judge was aware of this out-of-court indicator of incompetence. These records are discussed more fully *infra*, see Claim II.

able ground to doubt defendant's competency," and the "trial court's failure . . . to make further inquiry into the accused's competence constituted a *Pate* [v. *Robinson*, 393 U.S. 375 (1966)] violation and denied [Petitioner] a fair trial." *Demos v. Johnson*, 835 F.2d 840, 844 (11th Cir. 1988); see also *Miller v. Dugger*, 838 F.2d 1530 (11th Cir. 1988).<sup>2</sup>

4. There were many things "'suggesting incompetence which came to light during trial.'" *Morrow v. State*, 290 S.E.2d 137, 138 (Ga. 1982) (quoting *Drope*). First, by leaving the courtroom Petitioner severely prejudiced himself in the eyes of the jury, and prevented his attorney from providing effective assistance. So real was that harm that the judge, the prosecutor, and defense counsel all strongly disagreed with Petitioner being absent, and tried to convince him to remain in court. The danger and harm—so obvious to the *rational* participants—was lost on Petitioner, a circumstance which, in and of itself, should have raised for the participants the issue of incompetence. But it was not just the Petitioner's irrational and plainly self-defeating desire to be absent which should have compelled a judicial competency determination. Purporting to justify his absence, Petitioner revealed that he was patently unable to assist counsel, and that he had no rational or factual understanding of the proceedings or their consequences.

<sup>2</sup> Georgia law requires competency to be determined by a jury. Ga. Code § 27-1502. Furthermore, in Georgia.

[W]hen evidence was presented indicating incompetency during the trial, there was a duty on the trial judge to inquire into the issue of competency and hold a hearing on the issue.

The constitutional requirements of *Pate* and *Drope* continue throughout the criminal proceedings both prior to and during the main case itself . . . . [T]he actual issue of present incompetence must be addressed if there is evidence of incompetence which manifests itself during the proceedings.

*Baker v. State*, 250 Ga. 187, 297 S.E.2d 9, 12-13 (1982).

5. The following excerpts, among others, reveal the trial court's error. First, on February 27, 1987, defense counsel Leipold requested and received an ex parte in camera hearing with the trial judge, and explained his client's bizarre conduct:

(The following occurred in chambers:)

MR. LEIPOLD: I asked you to come in camera and I ask the record be sealed with reference to these matters.

THE COURT: I have already told my court reporter.

MR. LEIPOLD: First of all, I need to make a short record here:

I have been practicing for approximately 15 years. I was with the District Attorney's Office about six years. I have handled a number of criminal cases, as the Court is aware, a large number.

I have been in the posture where, until yesterday, *my client has declined to discuss this case with me, any of the facts surrounding this case.*<sup>3</sup> Now, until then, my position this morning was I was going to ask to come in, in camera, and ask you to appoint someone else or consider appointing someone else or allow me to withdraw, or do something, because—just to see if there was a problem in communication. That changed as of yesterday and I know [sic] longer make that motion. I am not asking to come out of the case. I am in the case and I will stay in the case.

But I am saying to you that because of that situation we are in a posture of where we are not overly

<sup>3</sup> This alone was enough to require a mental examination. Such an exam would have revealed that Larry Lonchar's refusal was tied to his mental illness and resulting paranoia. See Affidavit of Dr. Phillips. Even at this time, Petitioner was receiving psychiatric care and was on "suicide watch" in the county jail.

prepared to respond to this situation. I have been in a position where, really, the only thing I have been able to find out about this case has come from the District Attorney. I may have to, for that reason, move for continuance and refer back to this particular conference, and if that happens I would ask the Court simply to note what I am saying here today. *I never had this happen before and I really don't know how to deal with it*, but that is the position that I am in, until yesterday, and yesterday was the first time that we have discussed the circumstances at all. Before then my client declined to discuss the matter with me.

THE COURT: Let me ask, is there some reason why you were not cooperating with your attorney?

MR. LEIPOLD: Wait. There is a reason, and I don't want him to respond to that. He has told me the reason. I don't feel it appropriate for him to tell you that reason. When this is over I will be glad to explain that but—

THE COURT: I was going to let him know that he has the right to have assistance of counsel.

MR. LEIPOLD: Right.

THE COURT: He has the right to have an attorney appointed, if he can't afford an attorney. He does not have a right to choose what attorney that he is going to have to represent him.

MR. LEIPOLD: Let me amplify briefly, on the record. It is not a situation where Mr. Lonchar is saying that he does not like me, he does not want to talk with me or that we are having a personal dispute—and, Mr. Lonchar, the only response I'd like for you to make, if I am accurate, as to that, is that a yes or no to that?



MR. LONCHAR: (Defendant nods head up and down).

MR. LEIPOLD: Yes, was the response, that is not the reason.

THE COURT: And the other thing I want to let you know, you don't continue cases or don't get extensions of time by failing to cooperate.

MR. LEIPOLD: I need a psychiatrist, who is already working in this case, who we already used, who I'd like to continue to be able to employ. The public defender, frankly, assisted with some emergency funds that they had early-on in this case. I probably need, my estimate, something in the area of two thousand dollars. And that is a rough estimate. Okay?

(R. 1-6, February 27, 1987).<sup>4</sup>

6. Four months later, with the trial about to start, the following occurred:

MR. LEIPOLD: Now, *we have a matter that is a little bit different*. Mr. Lonchar has asked me to make a request of the Court, and he is quite serious about this. Mr. Lonchar does not wish to remain in court during the conduct of this trial. And in say-

<sup>4</sup> Five days after this hearing, defense counsel's psychiatrist provided counsel with a report in which he opined that Mr. Lonchar was "currently" competent to stand trial. That evaluation was unconstitutionally and incompetently performed, and its results were unreliable, in part because the doctor had no knowledge of the psychiatric records from the jail. See Claim IV, *infra*; see also Affidavit of Dr. Phillips, Appendix A. In any event, even if Mr. Lonchar was "currently" competent (*i.e.*, when last seen on December 11, 1986), his competence on February 27, 1987, and afterwards, was *not* addressed by the March 4, 1987 report, which did not even acknowledge Petitioner's "suicide watch" and psychiatric treatment while in jail.

ing that Mr. Lonchar has advised me that he understands that there will be times when his presence will be required, when people are need to point him out or make an identification of him. He is an intelligent person. He has admitted to me at that point he knows that he will have to come into the courtroom. He has stated to me that he does not wish to remain in this court room during the trial of this case, that he wants to be removed during the trial of this case.

I have taken strong issue with that—that is all I will say at this point in time—and advised him to the contrary as to that. And *I really don't know what to say at this point, Your Honor*. That is his position. He does not want to participate or be present during the conduct of the trial. He can speak on that as well as I can at this point in time, if he want to address you.<sup>5</sup>

THE COURT: Let me hear from the prosecutor, what their position is.

MR. PETREY: Your Honor, we would like that he be here for the entirety of the voir dire and all preliminary matters such that. Jurors sometimes will recall instances of seeing that person, now that they have sat here. After such time as the case begins we would not be opposed to his absenting himself as long as the State would have the right to recall him to be present in the courtroom during such time as we feel his presence will be necessary. Obviously, there are many issues of identification.

THE COURT: If he doesn't want to be here during the trial—I assume he is going to be here during the voir dire when we have the voir dire selection?

<sup>5</sup> As is shown in Claim II, *infra*, the jail psychiatrist wanted to medicate Petitioner, but Petitioner refused.

MR. LEIPOLD: That is what he has advised me, Your Honor.

THE COURT: Well, Mr. Lonchar, let me ask you whether or not you have heard what your attorney had to say, is that correct?

MR. LONCHAR: Yes, sir.

THE COURT: Is there anything else that you want to add to that—

MR. LONCHAR: No, sir.

THE COURT: —as to your attorney's request?

How about the voir dire? I think he ought to be here for the voir dire, but I will be glad to hear from you about that.

MR. LEIPOLD: Let's be sure the record is clear, because of the way you just phrased that perhaps it is not clear. This is not his attorney's request, you—

THE COURT: I understand that.

MR. LEIPOLD: You said as to his attorney's request.

THE COURT: It could have been phrased—

MR. LEIPOLD: This is my client's position, it is not my request.

THE COURT: All right. You have discussed it with your client?

MR. LEIPOLD: I have.

THE COURT: Does he have any objection to being here during voir dire?

MR. LEIPOLD: We did not discuss that in detail. That would be during the questioning of the jury? He will remain during that.

MR. LONCHAR: If I have to.

MR. LEIPOLD: Yes.

THE COURT: I want him here for that. *I probably would go along with his request* so long as he understands there are certain parts of the case where he'd have to be here for the purpose of identification. If that is his request, it is contrary to your instructions, Mr. Leipold—I assume you have instructed him otherwise and he has made a decision about that.

Mr. Lonchar, do you understand your attorney is advising you not to remove yourself from the courtroom during the trial of the case? Did you understand that, Mr. Lonchar?

MR. LONCHAR: Yes, sir.

THE COURT: And you say that for your own reasons you want to remove yourself from the trial?

MR. LONCHAR: Yes, sir.

THE COURT: Well, I am going to ask that you all leave, the District Attorney's office, the prosecutor.

MR. PETREY: May I bring one thing to your attention before we leave? It concerns the Unified Appeal. We haven't found it yet. We are almost sure there is a statement that says the defendant shall be present during all stages. We will continue to look for that.

THE COURT: I will be glad to hear from you. He is doing to do the voir dire. What I am going to do—he is going to do the voir dire and I will give you any chance—

MR. RICHTER: No need to worry about it right now.

THE COURT: I want you to be excused at this time, the prosecutors—the cameraman is not here.



I assume it is not on. Had you rather do this in chambers? Would that be easier?

MR. LEIPOLD: Perhaps that will be best.

THE COURT: Let's adjourn to my chambers and bring Mr. Lonchar right through here and we will just set-up and do it in my chambers. Mr. Snead, you may be here, if you'd like.

We will be in recess for about 10 minutes.

(Whereupon, a recess was had at this point).

(REPORTER'S NOTE: The following occurred in chambers in the presence of the defendant, his counsel, deputy sheriffs and the court reporter)

THE COURT: All right. Mr. Lonchar, the Court is concerned about your request for the simple reason that I want you to understand everything that is going on. I want you to be able to advise and assist your attorney during this trial.

Mr. Leipold, why don't you explain to the Court the discussion that you have had with your client about this situation?

MR. LEIPOLD: Mr. Lonchar basically has advised me that he does not want to hear falsehoods told about him, that he doesn't want his family to have to go through this, that he doesn't want his family and the other people to go through this, that he doesn't want to be present in the courtroom while he hears false testimony given about him, that he would rather remain absent from the courtroom during that period of time.

*I am most definitely not in agreement with this.*

MR. LONCHAR: As far as being present and assisting Mr. Leipold, I haven't assisted Mr. Leipold since he has taken this case. I have told him things, I have never told him the truth. Personally, I like

the man, but personally I never trusted Mr. Leipold, for my own reasons. I have never told him what happened, so, how can he assist me, you know. We know the outcome of this trial, you know, so, you know.

MR. LEIPOLD: I might should inquire into the question about him not trusting me before we get on in this matter.

THE COURT: Do you want to explain that a little bit more, Mr. Lonchar, why you would not trust Mr. Leipold?

MR. LONCHAR: I have my reason. Nothing personal, just, you know—and I have never ever, you know—I have told him three or four different stories and I have never actually told him exactly what happened, and I have my reasons. Like I say—and, so, you know, there is no way they [sic] he can assist me, you know, by being present. I can't assist him because I haven't been assisting him.

MR. LEIPOLD: *We have some serious problems right here now with what has just been said. I mean, I don't even know what to go forward with now. I really don't know what Mr. Lonchar is saying at this point.*

THE COURT: Mr. Lonchar, do you want to explain to us—we have had numerous hearings in which I have asked you whether you had any complaint about your attorney. I have given you more than an adequate amount of time to discuss all these things with your attorney. You have had a lot of evidentiary hearings, a lot of other proceedings. Now we are getting ready to go to trial and now you don't trust your attorney. Is there some reason why you are saying that?

In fact, we had one hearing in here, Mr. Leipold, he advised us then that you had just begun to tell him something. You know, that was—

MR. LEIPOLD: Are you saying, Larry, because I was a former DA, that you don't trust me? That is what you mentioned once before, that I, being a former District Attorney, and there might be a problem, is that what you mean?

MR. LONCHAR: Yes. That is part of it. But so far as Mr. Leipold, you know, as attorney, I have no objection, he is a very good attorney. But, you know, I do—you know, *I just want this over with, you know. Hell, we know the outcome of this, and we are playing all these games.* But I haven't, you know, I have never, you know, told Mr. Leipold.

MR. LEIPOLD: Would you tell me the truth at this point in time, Larry, in private?

MR. LONCHAR: No.

MR. LEIPOLD: Would you tell someone else the truth?

MR. LONCHAR: No.

THE COURT: Mr. Lonchar, all we can do is—and I don't mind saying this, I will say this on the record now, in my opinion, the attorney you now have is one of the best criminal attorneys that I have ever seen—

MR. LONCHAR: Sure.

THE COURT: —absolutely, no reason why you should—

MR. LONCHAR: No, I know.

THE COURT: —be—

MR. LONCHAR: I am not asking for another attorney.

THE COURT: I have seen his work in this case. I have seen his work in a lot of other cases. He has done everything that he can possible can for

your benefit and for your assistance. Now, you know, if you choose not to tell him the things that help him, I don't know what I can do about that.

MR. LONCHAR: There is nothing. That is true.

THE COURT: *Well, I would implore you as best I can and as emphatically as I can.* Mr. Lonchar, to tell Mr. Leipold what it is that you need to tell him. Whatever question that he asks you, to cooperate with him, and you are the only one. *Apparently you have come to conclusion that there is a forgone conclusion in this case. We haven't struck the jury yet and I don't understand why you have that attitude, and I would ask that you just do everything that you can to assist your attorney.*

MR. LEIPOLD: Is there anything else that you want to tell the Judge, Larry?

MR. LONCHAR: I just repeat the way that I feel, you know. *My presence is irrelevant.* And like I say, I haven't been assisting him and I am not going to start assisting him, and I am asking, you know, like I say, I realize at times I will have to be present. I realize that and I will cooperate. But as far as, you know—I have read that the law says once the jury is impaneled that I don't have to be present, you know. I don't want to cause a scene where you have to handcuff me and chain me to the seat and gag me and all that. However, I feel, you know, if that is my only alternative, then I will, I mean, that is what I am asking, you know, to avoid all of this, you know. I know what is going to happen in this case and, you know, there is nothing I can do about it and—

THE COURT: You say you know what is going to happen in this case. Is there anything that you want to tell me about that? What do you think is going to happen in this case?



MR. LONCHAR: Well, there have been a lot of fabrications, you know.

THE COURT: Well, see—but that is the purpose of a trial, folks can—if you don't help your attorney, if you don't give him the ammunition, if you don't give him the assistance so that he can represent you, then how can you possibly expect that the result will be any different than what you have already decided in your mind it is going to be?

MR. LONCHAR: Well, it is just, you know—I men, I am just being realistic and come on—you know—a jury will—I mean police officers say this, the jury is going to, you know, take my word that he is lying, you know?

THE COURT: It happens. Happened in my court before. The jury makes up their minds based upon the evidence. If you choose not to participate and to be aware you are damaging your case, I am sure.

MR. LONCHAR: I have no case, Your Honor, I have no case. You know, this—you know—

THE COURT: Well, all right. I am sorry you feel that way. But all I can do is advise you as to what your rights are and advice [sic] you what your alternatives are. It is your decision.

MR. LONCHAR: Thank you.

THE COURT: If you chose [sic] not to assist your attorney and you chose not to be present, I will probably allow you to have that option.

MR. LONCHAR: Thank you.

THE COURT: Mr. Leipold, anything else that you want to say on the record?

MR. LEIPOLD: *I just think this is a mistake as far as the way to conduct the trial, and I advise*

*Mr. Lonchar I think it is a serious mistake and I don't agree with his decision.*

THE COURT: Well, maybe he can reconsider. I will give him a chance to think about it. Obviously, I do want him during the voir dire which may take some period of time, and I once again ask him before—I will ask you, Mr. Lonchar, I will ask you to ask Mr. Leipold to advise me when you wish to be excused and at that point I will reconsider it and I will ask him to reconsider.

(R. 50-69)

7. After voir dire, the following occurred:

MR. LEIPOLD: I speak now as an advocate for the position that I might think is the appropriate one, but, rather, my understanding of the Canons that I should convey the desire of my client to the Court, and my client has again reiterated this morning that he does not want to be present.

I have urged him to stay and urged him to change his mind on the things that he told the Court yesterday. There were matters that we discussed in camera that I think would justify the Court in acquiescing as far his desire to be out of the courtroom. I am not happy with it, I don't agree with it, but my understanding is that is his desire, unless he advises me otherwise. I have asked him that a short period of time ago.

THE COURT: Mr. Lonchar.

MR. LEIPOLD: Stand up.

THE COURT: You recall the discussion that we had yesterday morning, sir?

MR. LONCHAR: Yes, sir.

THE COURT: You will recall both the Court's request and your attorney's request that you remain

in the courtroom, but that I told you that that was the decision that I would probably allow you to make. I wanted you to sit through the voir dire process and I wanted you to have an opportunity to reconsider that issue..

I am going to allow you, if you wish, to withdraw yourself during those parts of the trial that you think is—that you want to be excused from, if you wish to do so. I want to advise you, however, that, obviously, you would not be here, first of all, to assist your attorney in responding to questions and certainly you would not be here to evaluate what it is that your attorney does in your behalf. If you want to voluntarily give up those right that *you are, in fact, giving up a very valuable right that you have* and I am sure Mr. Leipold is going to do an excellent job, do the best possible job that he can do on your behalf, there is no question about that. There is, however, no question that *it is always better to have your client with you in court, both for strategic purposes and also for information purposes.* Mr. Lonchar do you understand what I am telling you?

MR. LONCHAR: Yes.

THE COURT: Now are you telling me that you still want to be absent from certain parts of the trial?

MR. LONCHAR: Yes, sir.

THE COURT: Do you understand that there may be certain parts of the trial, which I will have to direct that you be here, for identification and for certain other purposes, do you understand that?

MR. LONCHAR: Yes, sir.

THE COURT: All right, sir. I will at any time give you the opportunity to come back into Court whenever you wish to come back into Court and I will do whatever is necessary to facilitate your re-

entry back into Court out of the presence of the jury. So, you can come back in whenever you'd like. Do you understand that, Mr. Lonchar?

MR. LONCHAR: Yes, sir.

THE COURT: Is there anything that you want to ask me about anything that is going on so far?

MR. LONCHAR: (No answer).

(R. 559-562).

8. After the court heard from several witnesses, adjourned, and returned to court, the trial judge again advised Petitioner:

(The defendant was brought into the courtroom at this point)

THE COURT: Mr. Lonchar, there have been no witnesses presented yet [today]. I, once again, want to give you the opportunity to make yourself available and ask you to be present in court during these proceedings. I understand that you have talked with your attorney—

MR. LONCHAR: Yes, sir.

THE COURT: —and he has again asked you, also. And the court is not going to force you, it is not going to force you to sit here handcuffed to the chairs or anything like that, but I want to ask you, and tell you again, that things are going on, your case is proceeding. I will give you another opportunity to be here if you wish to be here.

THE DEFENDANT: No.

THE COURT: You don't wish to be here, Mr. Lonchar?

MR. LONCHAR: No.

THE COURT: Anything before we excuse Mr. Lonchar?



MR. RICHTER: No, sir.

THE COURT: I don't know that Buis has to identify him for any reason.

MR. RICHTER: No.

THE COURT: All right, Mr. Lonchar, you may be excused.

(The defendant was removed from the courtroom at this point)

(R. 1037-38).

9. After Petitioner was convicted, he attempted to prevent the presentation of any evidence on his behalf at sentencing. The trial judge overrode his request, but even this prompted no inquiry into competency:

THE COURT: Mr. Lonchar, this is the part of the case where the jury gets to hear evidence, as I am sure you have discussed with your attorney, but I will make sure that you understand, the jury gets to hear evidence on the question of what is an appropriate punishment. I don't know whether you've had a chance to talk with your attorney about your presence during this part of the case.

Mr. Leipold, have you talked with him about that issue this morning?

MR. LEIPOLD: Yes, I have.

THE COURT: Have you—let me ask you, Mr. Lonchar, what is your request? Do you want to be here during this part of the case?

THE DEFENDANT: Yes, sir, I'd like to object to the way—if he is going to call some witnesses, and I have already stated I do not want no witness called on my behalf or anything in my behalf. I just like to be here, you know, if he does it against my wishes.

THE COURT: Well, do you want—do you want to have it held in my Chambers to discuss that? Mr. Leipold and Mr. Lonchar, do you want to have the hearing in my Chambers?

(The following occurred in Chambers with the above-mentioned individuals present)

THE COURT: Do you want to explain to me what it is that you are concerned about, about Mr. Leipold presenting witnesses, please?

MR. LONCHAR: Yes, Your Honor. This is my life, you know, I have made my decisions, you know, I have made it before the trial even started. I tied my attorney's hands. I have my reasons. And now he'd like to present my dad, he'd like to present, you know, other, you know, and I strongly object to it. This is my life and I am competent to, you know, decide, you know, who I want or who speaks in my behalf, and I—if I have, you know, I guess—this is my right, I would like nothing spoken on my behalf.

THE COURT: Well, you understand, I am sure you do, Mr. Lonchar, I don't mean to make light of this, but do you understand the jury is going to decide whether or not to—

MR. LONCHAR: Sure. Yes, sir.

THE COURT: —to impose the death penalty in this case?

MR. LONCHAR: That's correct.

THE COURT: Mr. Leipold, have you had a chance to talk—

MR. LEIPOLD: *I am somewhat a loss here.* Mr. Lonchar has forbidden me to call his father as a witness in this case.

MR. LONCHAR: He is not my father. I could have had, you know, other family here, you know, friends. I, you know, I don't—if I wanted to defend, would have produced witnesses for the guilt or innocence trial part of the trial, you know. I tied your hands and I strongly object to anybody being called on my behalf.

MR. LEIPOLD: *The problem I have, of course, some ethical problem as to what do I do at this point in time, and I don't have the slightest idea.*

MR. LONCHAR: This is my life. I feel like I am competent to stand trial and competent to make my own decisions as far as, you know, who should be called.

THE COURT: Well, you know, I will let you make that decision as to guilt or innocence, I let you make that decision. This is a different situation now. Okay?

MR. LONCHAR: Yes.

THE COURT: I think to some extent the Court has a stake in making sure the jury gets the information that it needs to make a decision. And, Mr. Lonchar, for whatever reason that you have decided that you don't want to present any evidence, I am going to request, on behalf of the Court, that Mr. Leipold make some sort of presentation of whatever you think is appropriate under the circumstances. Whatever your reasons for feeling that way and whatever decision you have made about that is your decision. I want you to understand this jury has made the decision that you are guilty of three counts of malice murder. For the law to execute properly—I don't mean "execute" in the corporal, I mean—

MR. LONCHAR: Yes.

THE COURT: —for the law to go forward, this jury has to have information. Okay? And if you

just decide to stand there and not present them anything, the jury won't have the information that it needs. Now, see, the State has the burden of proof in the guilt-innocence part of the trial to prove you are guilty. You could take the stand if you wanted to, and the State still has the burden.

But now we have a situation where the jury has found you guilty, so, now the question becomes what should the jury do. And this is a whole different ballgame.

MR. LONCHAR: Well, the State is going to present, you know, my past record, and they are going to—

THE COURT: You have got—and I will say this on the record, but not in front of a lot of folk—you probably have one of the better attorneys that I have ever seen operate in this court.

MR. LONCHAR: Right. I understand.

THE COURT: You ought to listen to him rather than making up your own mind. *You don't know what is going on. You are too involved in this case.* You are obviously the defendant. The whole purpose of our system is to get an advocate who can evaluate a case and make a decision and assist you. That is why the Constitution gives you a right to have an attorney. That is why Mr. Leipold has been there arguing every moment on your behalf, not because of what you want, but because of what our system requires. Okay?

MR. LONCHAR: Yes, sir.

THE COURT: And if you want to go and do one thing, that is your decision, but I am the Judge here and I have got a system to protect and I have got a system to make sure it is fair. There is not just you involved. We have got those jurors in there who have to make a decision about a very, very important matter.



Mr. Leipold feels very strongly about your case. I know he has worked very hard on this case and has done a lot of things on your behalf, and I am telling you that, in my opinion—and I am going to ask him to present the people that he would have presented.

MR. LONCHAR: Well, like I say, that is the case, just my dad is here, you know, I could call my whole family here, my friends, you know, but, you know, so, just present one person here—

THE COURT: Because he is a representative and probably is the most—I have gotten—you know, you could present, obviously, everyone who knows you, but the jury wants to get some flavor of the kind of person that you are, and a person who can speak on your behalf or can give some insight into the kind of person that you were, and kind of person that you are, that is important.

What else do you have?

MR. LEIPOLD: The only thing that I intended to produce was his father and also a letter that we'd like to offer as the reason for the absence of his mother, which I am sure the State will object to, but that is a matter to be taken up.

THE COURT: Is it the same letter that I got?

MR. LEIPOLD: Yes, sir. As a matter of fact, it is. You gave me a copy.

THE COURT: All right. I will probably allow that. I don't know. I will hear from them.

Mr. Lonchar, I am going to ask Mr. Leipold to make every argument that he can possibly make and I am going to ask him, you know, to try and present the evidence that he thinks is appropriate under the circumstances.

I don't know whether you want to testify or not, or whether you want to say anything to this jury or not. All the Court wants to do is make sure that down the road you don't have a change of heart and say, "I wish I had done something differently."

MR. LONCHAR: I won't.

THE COURT: "I wish I had done this." And I guarantee you there will come a time when you just kind of absent yourself from this part of the case, you are going to be sorry you did and, so, I am going to ask that you be in court during this part of it. I think that is important for the jury to see you and I think that it is important for you to be present. I have granted your request before.

MR. LONCHAR: That's correct.

(R. 1341-1349).

10. The record reveals that the trial judge knew that Petitioner was suicidal, that he had asked police to kill him, and that he was asking for the death penalty. The trial judge knew that before the offense, Petitioner's parole officer was so concerned about him that she sought psychiatric help for him. He knew that Petitioner was not cooperating with counsel, was acting against his own best interest, and was absent from the courtroom. He knew from the sentencing exhibits that Petitioner had received psychiatric treatment in prison. Under *Drope v. Mississippi*, 420 U.S. 162 (1975), the trial judge had an absolute obligation to conduct a competency determination, and the failure to have done so requires reversal *ipso facto*:

Even where a defendant is competent, at the commencement of his trial,<sup>6</sup> a trial court must always be alert to circumstances suggesting a change that

<sup>6</sup> There was no judicial determination of Petitioner's competency before the trial, at the start of trial, or during trial.

would render the accused unable to meet the standards of competence to stand trial. Whatever the relationship between mental illness and incompetence to stand trial, in this case the bearing of the former on the latter was sufficiently likely that, in light of the evidence of petitioner's behavior including his *suicide attempt*, and there being *no opportunity without his presence to evaluate that bearing in fact*, the correct course was to suspend the trial until such an evaluation could be made.

The question remains whether petitioner's due process rights would be adequately protected by remanding the case now for a psychiatric examination aimed at establishing whether petitioner was in fact competent to stand trial in 1969. Given the inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances, see *Pate v. Robinson*, 383 U.S., at 386-387, 86 S.Ct. 836, 842-843, 15 L.Ed.2d 815; *Dusky v. United States*, 362 U.S., at 403, 80 S.Ct., at 789, we cannot conclude that such a procedure would be adequate here. Cf. *Conner v. Wingo*, 429 F.2d, at 639-640. The State is free to retry Petitioner, assuming, of course, that at the time of such trial he is competent to be tried.

*Drope*, 420 U.S. at 181, 183 (citations omitted). Suicidal behavior, absence from court, a history of psychiatric problems, and bizarre actions both in and out of court similarly required a judicial competency determination here, and the failure to have made such a determination requires reversal.

## CLAIM II.

### PETITIONER WAS TRIED AND SENTENCED TO DEATH WHILE INCOMPETENT, IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

This claim is evidenced by the following facts:

1. All other allegations in this petition are incorporated into this claim by specific reference.
2. Regardless of whether Petitioner was in fact incompetent at trial and sentencing, if the circumstances at that time required an inquiry into competency, and that inquiry did not occur, retrial is necessary. In Claim I, *supra*, Petitioner demonstrated that a judicial determination of competency was required, given the circumstances known or reasonably knowable to the trial and sentencing judge, and that, on that basis alone, retrial is required. See *Drope v. Missouri*, 420 U.S. 162 (1975); *Demos v. Johnson*, 835 F.2d 840 (11th Cir. 1988); *Hance v. Zant*, 696 F.2d 940 (11th Cir. 1983).
3. Even had circumstances suggesting Petitioner's incompetence *not* appeared of record to the trial judge, if Petitioner was in fact incompetent at trial and sentencing, his conviction and sentence violate the Sixth, Eighth, and Fourteenth Amendments. *Pate v. Robinson*, 383 U.S. 375 (1966). In this claim, Petitioner demonstrates that there is a bona fide doubt regarding Petitioner's competence at trial and sentencing.

4. The constitutional test for incompetency is articulated in *Dusky v. United States*, 362 U.S. at 402 (1960):

[T]he "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."



*Id.* See also *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966); *Bishop v. United States*, 350 U.S. 961 (1956). Criteria usually examined to determine incompetency include any prior history of mental illness, unusual out-of-court actions, unusual in-court actions, self-defeating and counterproductive defendant actions, and current evaluations regarding competency at the time of trial.<sup>7</sup> All these indicia reveal in this case that Petitioner was incompetent.

5. The record available from the trial raises a bona fide doubt as to competency. On June 8, 1987, the state provided defense counsel with some of Petitioner's statements. Included in the statements was Petitioner's parole officer's rendition of a conversation she had with Petitioner after the offense. According to the parole officer:

I told Larry that I know he had been depressed and that was why I had wanted him to go to Clayton Mental Health. I reminded him that he had an appointment scheduled for 10/15/86, two days after everything had happened.

(R. 206). Thus, immediately *before* the offense, a parole officer had recognized that Petitioner was in need of mental health care. *After* the offense, the record shows that Petitioner was suicidal, he wanted police to kill him (R. 205), he wanted to get the death penalty (R. 237), he did not want evidence presented for him, he was paranoid about his attorney, he would not speak to his attorney, and he absented himself from the courtroom. See Claim I, *supra*.

<sup>7</sup> "Pate requires a *nunc pro tunc* competency hearing so long as a meaningful inquiry into the defendant's competency can still be made. *Zapata v. Estelle*, *supra*, 588 F.2d at 1020. If such an inquiry is no longer possible, the defendant must be retried if found competent, or released. *Id.*" *Hance v. Zant*, 696 F.2d 940, 948 (11th Cir. 1983); see also *Fallada v. Dugger*, 819 F.2d 1564, 1567 (11th Cir. 1987).

6. Matters not contained in the record also raise a *bona fide* doubt as to Petitioner's competency. First, Petitioner has a documented history of mental illness. Records were readily available but were not obtained by defense counsel. These reveal that Larry Lonchar has a history of mental illness dating back at least to age 13, that his mother and other members of his family suffer from mental illnesses, and that he had been treated for mental illness regularly. First, Dr. Phillips' report details mental illness in the family:

The children described their mother as a woman who "drank Coca-Cola all day long and ironed." They recall her buying cases of Coke and setting them next to the ironing board with a bottle opener. She used to open bottle after bottle, like a chain smoker would cigarettes. It was not until later years that the children came to realize that mother was washing a multitude of prescription pills down with the Cokes. It was not long thereafter that she had forgone the Cokes for liquor.

It was approximately during this time frame that Elsie Lonchar suffered her first psychotic decompensation and was admitted to the Battlecreek Sanatorium where she remained approximately 10 days and was discharged on (Mellaril). Upon her release she requested and obtained disability payments for psychiatric disability . . . .

(Appendix A to Petition, *Kellogg v. Zant*, Butts County Civil Action No. 90-V-2735).

7. Petitioner's history of psychiatric disorders is well documented:

The documented psychiatric records which have been provided to my office for review . . . document Mr. Lonchar's difficult, violent and chaotic adolescence, his "unexplained" behavioral turn for the worse at

about age 18, and his subsequent compulsive and uncontrollable behavior throughout the rest of his life.

While admitted for formal psychiatric treatment only once in his life, namely at age 15 when committed through the juvenile courts to the Plainwell Sanatorium, his life history is replete with episodes of truancy, disruptive behavior, and inappropriateness beginning at age 14 and continuing throughout his retention in juvenile facilities or prison with only brief interludes while placed on parole.

Multiple mental health examiners have pointed out Mr. Lonchar's need for intensive psychotherapy. He has frequently been described as both "very labile, nervous and having a high anxiety level." In 1970, a clinical psychologist reported that "Larry has no idea why he follows his impulses without logic or apparant reason." In 1978, another psychological examiner when formulating his clinical opinion of Larry stated, "emotional and physical abuse during formative years; needs intensive psychotherapy; very frightened and anxious; acts out very impulsively; it is very unlikely that he would callously harm others; immature, insecure, frightened, anxious, emotionally confused."

Despite the multiple notations and identifications of underlying psychopathology in this man, there have been few if any documented attempts to clinically treat his underlying symptoms. According to record, Mr. Lonchar or his parole officer contacted the Clayton County Mental Health Center a few days prior to October 13, 1986, the date of the offense for which he is presently sentenced to death, and scheduled psychiatric treatment for him.

Throughout his incarceration before and during trial, medical personnel well documented Mr. Lonchar's

psychiatric illness and need for psychiatric treatment. Although they expressed a desire to medicate him for his mental illness, he refused medication. Consequently, he was frequently placed on suicide watch because of the overt manifestations of his depression and the clinical indication as reported by jail mental health examiners that he was at a significant risk of self-harm as a result of his mental status.

(*Id.*) The jail records to which Dr. Phillips refers are records kept while Petitioner was on trial for the cases leading to his current predicament. Those records are especially relevant to this claim, because they were kept during the time when it is contended Petitioner was competent.

8. The jail medical personnel knew that Mr. Lonchar was psychiatrically ill, they wished to medicate him for his mental illness, and they kept him on suicide watch throughout his incarceration. According to Doctor's Progress Notes, readily available to but not obtained by trial counsel, Petitioner was suicidal and under suicide watch constantly:

#### DOCTOR'S PROGRESS NOTES

10/31/86	Admitted to DeKalb County Jail
11/3/86	Inmate Lonchar is tearful, but co-operative. . . . He admits to seeing a psychiatrist when he was young . . . . He says he feels he has a split personality
12/11/86	Pt. seen for psychological assessment. He is very depressed and should be considered a high suicide risk
12/11/86	Place on suicide precaution
12/15/86	Evaluated by Dr. Pellingier; patient has suicide ideation
12/21/86	Insists on seeing psychiatrist because of his nerves



- 12/22/86 Evaluated by Dr. Pelling, psychiatrist
- 12/22/86 Suicide precautions ordered
- 12/31/86 Inmate is depressed about his situation. States he was hospitalized in Michigan for his nerves some years ago . . . Will check back periodically (evaluation by Dr. Ermutlu)<sup>8</sup>
- 1/21/87 Still feels depressed and anxious . . . will be followed (evaluation by Dr. Ermutlu)
- 1/30/87 Inmate at first did not want to be seen (by Dr. Ermutlu), but eventually came in. He maintains his pessimistic attitude. Appears depressed but refuses to take any medicine . . . . wants no medical attention . . . . the staff should be cautioned to continue watching him (Dr. Ermutlu)
- 1/30/87 Capt. Bishop notified of suicide precautions
- 2/10/87 Complaining of bumps on shoulders, chest, arms, past month itching
- 2/12/87 Examined, hx neurodermatitis, multiple excoriations over chest and upper arms, neurodermatitis, Rx Hytome & Benadryl
- 5/13/87 I recommend that inmate Lonchar remain on suicide watch and refer him to the psychiatrist for evaluation for suicidal ideations. J. Canady
- 5/18/87 Scheduled to be seen [by Psychiatrist] but he is in Court today. Dr. Ermutlu
- 5/20/87 He is pessimistic, does not want to live. Sees no future for himself and does not even want his lawyer to defend him. Should be kept on suicide watch. (Dr. Ermutlu)

<sup>8</sup> Defense counsel Leipold visited Petitioner two times during this period, on December 8 and November 5.

- 5/20/87 Tower #2 notified that Dr. Ermutlu continued the suicide watch

9. Thus, a documented history of mental illness, bizarre in-court and out-of court actions during the period in question, and contemporaneous with trial diagnosis of and treatment for mental illness, all point to incompetence. Current psychiatric evaluations do also. Dr. Phillips, after a thorough examination, concluded that Petitioner was incompetent to stand trial:

Specifically, and as will be elucidated in the following sections of this report, it is my professional opinion, to a reasonable degree of medical certainty, that Mr. Lonchar lacks the competence to decide whether or not to proceed with his appeals. *Furthermore, he was unable at trial to knowingly, intelligently, and voluntarily waive his right to be present, or any other constitutional right, he was, in fact, incompetent to stand trial, and his major mental illness prevented him from waiving rights pre-trial, including the right to silence.* Finally, it is my opinion that significant evidence in mitigation of punishment was available at trial and sentencing, had there been a proper evaluation of Mr. Lonchar.

The most challenging forensic question is whether or not Mr. Lonchar maintains both past and present the appropriate level of "competence" to cooperate effectively with counsel and to make important decisions in regard to his case. Mr. Lonchar does, as detailed in this report, suffer from the serious effects of significant psychiatric illness which frequently border on psychotic thought process further impaired by the effects of overt paranoia and obsessional self-destruction which substantively impair his capacity to make reasonable and knowingly voluntary decisions. During my clinical examination of Mr. Lonchar, we spent considerable time discussing his ability to trust

and work cooperatively with his counsel. There was evident during that discussion the emergence of paranoid thinking with obsessionally self-destructive and suicidal thought process that borders on the psychotic and is unquestionably effecting his ability to cooperate with counsel.

Furthermore, I hold the opinion, within a reasonable degree of medical certainty, that Mr. Lonchar's inability to cooperate with counsel is not only clearly evident at present, but in retrospective review of his court proceedings, there is substantial evidence that raises a bona fide question regarding his competency at the time of trial and his ability to voluntarily make a knowingly and intelligent waiver of his constitutional rights.

*Summary:*

In my professional medical judgement, Mr. Larry Grant Lonchar, by virtue of the psychiatric diagnoses and opinions rendered herein, suffers from a diminished judgmental capacity that could be considered as mitigating the imposition of the ultimate penalty. Further, it is my opinion that his mental condition at the time of trial was such that he was both unable to cooperate with his counsel, to have a rational and factual understanding of the proceedings, and unable both then and now to make a knowing, intelligent and voluntary waiver of his constitutional rights.

(*Id.*)

10. Because petitioner was incompetent to stand trial, retrial is required.

CLAIM III.

ASSUMING THAT THE LAW ALLOWS A PERSON TO WAIVE HIS OR HER PRESENCE AT A CAPITAL TRIAL AND SENTENCING PROCEEDING, THE INQUIRY BY THE TRIAL JUDGE WAS INSUFFICIENT TO DEMONSTRATE A KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER OF THAT RIGHT BY PETITIONER, AND PETITIONER IN FACT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HIS RIGHT TO PRESENCE.

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. As Petitioner has consistently asserted, the right to be present when one is on trial for one's life is non-waivable, and thus any purported "waiver" made by Petitioner has no legal effect. *See, e.g., Proffitt v. Wainwright*, 685 F. 2d 1227, 1257-58 (11th Cir. 1982); *Hall v. Wainwright*, 733 F.2d 766 (11th Cir. 1984); *In re United States of America*, 784 F.2d 1062 (11th Cir. 1986).

3. When Petitioner raised this issue on direct appeal, the Georgia Supreme Court allowed such a "waiver", and concluded that Petitioner understood his rights and the dangers of leaving, "or should have, because the court so advised him." However, because of Petitioner's mental illness it is abundantly clear that he in fact did not knowingly, voluntarily, and intelligently waive his right to presence, and had the trial court or trial counsel acted properly vis-a-vis Petitioner's bona fide issue of incompetency, the result in this case would have been different.

4. If there were the potential for an effective waiver of the right, the issue of "waiver of presence" would be somewhat tied to the issue of competency, and *Drope* is instructive:



Our resolution of the first issue raised by petitioner makes it unnecessary to decide whether, as he contends, it was constitutionally impermissible to conduct the remainder of his trial on a capital offense in his enforced absence from a self-inflicted wound. See *Diaz v. United States*, 223 U.S. 442, 445, 32 S.Ct. 250, 251, 56 L.Ed. 500 (1912). However, even assuming the right to be present was one that could be waived, what we have already said makes it clear that there was an insufficient inquiry to afford a basis for deciding the issue of waiver.

*Drope v. Missouri*, 420 U.S. at 182.

4. Because Petitioner did not knowingly and intelligently waive his right to presence, retrial is required.

#### CLAIM IV

THE STATE INTRODUCED CONVICTIONS PREDICATED UPON GUILTY PLEAS WHICH WERE UNCONSTITUTIONALLY OBTAINED AND WHICH, ON THEIR FACE, REVEALED 1) THAT THEY WERE NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTERED, AND 2) WERE TAKEN WITHOUT THE ASSISTANCE OF COUNSEL; IN ADDITION, THE PLEA TRANSCRIPTS INTRODUCED CONTAINED REFERENCES TO OTHER UNCONVICTED CRIMINAL ACTS, ALL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, REQUIRING RESENTENCING.

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. The only evidence introduced by the State at sentencing was Exhibits 2-6. These exhibits revealed five prior convictions of Petitioner, which the State labeled Petitioner's "resumé":

When Larry Lonchar comes before you, in the presence of you, and through his attorney ask you for mercy, here is his resume, that is his resume.

(R. 1410). The prosecutor had discussed Petitioner's prior record for three pages of transcript before this "resumé" argument, and continued to stress Petitioner's record as a prime basis for death throughout his closing argument. As the United States Supreme Court emphasized in *Johnson v. Mississippi*, — U.S. —, 108 S. Ct. 1981, 100 L. Ed. 575 (1988), any error in the introduction of invalid prior convictions is especially prejudicial where the convictions are emphasized by the prosecuting attorney in closing argument:

We eschew 'harmless error' in our reasoning . . . because the district attorney argued this particular aggravating circumstance as a reason to impose the death penalty.

*Id.*, 108 S. Ct. at 1989 n. 8 (quoting *Johnson v. State*, 511 So. 2d 1333, 1338 (Miss. 1987)).

3. Exhibits 2-6 were inadmissible, on account of a variety of constitutional and statutory defects described below:

a-1. *Exhibit 1*<sup>9</sup>—This involved a conviction and sentence entered December 22, 1969, for the offense of break-

<sup>9</sup> The State had pre-marked six exhibits, 1-6. What the State had originally tendered as Exhibit 1 at sentencing was excluded. This "Exhibit" appears in Volume VI, record on appeal, immediately after p. 1644. The actual exhibit 1 appears at and after p. 1645, although it was pre-marked and remained marked as State's Exhibit Sentencing 2. All of the 11 pages appearing after p. 1645 were introduced, as the designation at the bottom of the pages indicate. Each page was pre-marked "SS2" as State's Sentencing 2.

All 5 exhibits were treated in this way. Hence, State's Sentencing Exhibit No. 2, appearing after page 1646 was pre-marked "State's Sentencing Exhibit 3" and every page contains "SS3" at

ing and entering. The plea was taken November 21, 1969, and the plea transcript reveals that the plea was not knowingly, intelligently, and voluntarily entered. Petitioner was not properly advised regarding, and hence did not waive, all of the rights embodied in trial by jury. He was not advised of the presumption of innocence, the right to confrontation, the right to cross-examination, the right to silence, the right to testify, the right to have no comment made regarding his silence, the right to the assistance of counsel, the right to appeal, etc.

a-2. The pleas was plainly entered in violation of *Boykin v. Alabama*, 395 U.S. 238 (1969), and the conviction and sentence were inadmissible in this capital sentencing proceeding. Additionally, the plea transcript included reference to a separate two count indictment which contained in Count 1 a charge against Petitioner of attempted robbery with a 22 calibre revolver.

a-3. He purportedly then pled to Count two, larceny. Exhibit 1 does not contain that two count indictment, or a judgment of conviction. The purported plea colloquy was clearly inadmissible, because no conviction was introduced. The jury was therefore led to believe that Petitioner had more convictions than the prosecution actually presented. The United States Supreme Court first recognized over forty years ago that due process prohibits the sentencer from relying, even in part, on false representations regarding the accused's prior convictions. See *Townsend v. Burke*, 334 U.S. 736 (1948); accord *Johnson v. Mississippi*, 108 S. Ct. at 1987. This "evidence" was also inadmissible because, like the breaking and entering plea, it was taken in complete disregard of the *Boykin* requirements.

b-1. *Exhibit 2*—This involved a conviction for burglary supported by a plea entered December 8, 1969. On the

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the lower right hand corner. All reference here to the Exhibits will be to the *admitted*, not the pre-marked, number.

face of the plea colloquy it is revealed that Petitioner was not represented by counsel, but represented himself at the hearing. As the United States Supreme Court "held in *United States v. Tucker*, 404 U.S. 443, 447-49, 92 S. Ct. 589, 591-93, 30 L. Ed. 2d 592 (1972), even in a non-capital sentencing proceeding, the sentence must be set aside if the [sentencer] relied at least in part on 'misinformation of constitutional magnitude' such as prior uncounseled convictions . . ." *Zant v. Stephens*, 462 U.S. 862, 887 n. 23, 103 S. Ct. 2733, 2748 n. 23, 77 L. Ed. 2d 235 (1983); accord *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258 (1967).

b-2. Even under the standards required in a criminal case where there is no doubt as to the mental state of the accused, there was no valid waiver of counsel, as Petitioner was not advised of the dangers and disadvantages of self-representation. *Faretta v. California*, 422 U.S. 806 (1975).

b-3. Petitioner was not advised of the presumption of innocence, the right to silence, the right to testify, the right not to testify and not to have that used against him, the right to appeal, etc. The plea was plainly taken in violation of *Boykin*. Before a defendant can make any waiver, the State must make a showing that a waiver has been made "with a full understanding of what [it] connotes and its consequences. . . ." *Boykin v. Alabama*, 395 U.S. at 243-44; see also, *McCarthy v. United States*, 394 U.S. 459, 466 (1969). The Georgia Supreme Court has held the same, noting that when the voluntariness of a guilty plea is presented, "the burden is on the state to establish a valid waiver." *Pope v. State*, 256 Ga. 189, 345 S.E.2d 831, 844 (1986) (emphasis supplied).

b-4. In *Fay v. Noia*, 372 U.S. 391 (1963), the United States Supreme Court held that the State must show that the:

applicant, after consultation with competent counsel or otherwise, understandingly and knowingly fore-



went the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as . . . deliberate . . . .

*Id.* at 439. Respondent's burden is therefore a heavy one and has not been met in this case.

c. *Exhibit 3*—This exhibit included a two count indictment, and a plea transcript. The indictment charged two crimes, burglary and larceny. Mr. Lonchar pled *only* to larceny, but the jurors, through the plea transcript and indictment, were exposed to the unconvicted charge of burglary. Furthermore, during the plea colloquy, Petitioner confessed to a completely unrelated uncharged, and unconvicted offense. Finally, the plea was taken in violation of *Boykin*. (R. 1642).

d. *Exhibit 4*—This exhibit included a two count indictment charging robbery and larceny. A plea was entered to larceny. During the plea, evidence was introduced that Petitioner was on parole, and he could be sentenced for the offense of committing an offense while on parole. Count I, the robbery count, was dismissed. *Another* robbery charge, completely unrelated to the charge in Exhibit 4, was also discussed: "Count I would be dismissed together with another charge, that of armed robbery of the Spring Lanes Bowling Alley, I think File Number 28-62."

e. *Exhibit 5*—This exhibit involved a two count indictment charging armed robbery and possession of a firearm during the commission of a felony. A plea was entered to both counts. During the taking of the pleas, the Court commented that, "before we get started, not too long ago *on another case* you changed your mind about offering a plea, which, of course, is your privilege." He also told the Petitioner that he had committed the crime of being a repeat offender, which was not charged. Defense counsel referred to other charges and potential

charges, that would either be dismissed or not instituted: 1.) a pending case of armed robbery and possession of a firearm during commission of an offense, 2.) a pending case of felonious assault and possession of a firearm, and 3.) habitual criminal charges.

4. In each of these cases, the prosecution was allowed to submit records which indicated that Petitioner would be granted parole, or early release. In State's Exhibit 4, the sentencing judge made extensive reference to the question of parole. (Exh. 4 at 3-4; *see also* Exh. 5 at 3-4). This was in flagrant violation of this State's policy, which requires an automatic mistrial if the jury is tainted by reference to parole. *See O.C.G.A. § 17-8-76*. As the Supreme Court of Georgia recently stated, "a defendant's parole eligibility is not, and ought not to be, an issue considered by the jury in the sentencing phase of a capital trial." *Quick v. State*, 256 Ga. 780, 353 S.E.2d 497, 503 (1987) (*citing Westbrook v. State*, 256 Ga. 776, 353 S.E.2d 504 (1987)).

5. In each of these cases, where counsel was provided, Petitioner did not receive the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

#### CLAIM V.

THE PREDICATION OF A CONVICTION FOR MURDER AND A DEATH SENTENCE ON A THEORY WHICH THE PROSECUTOR KNOWS TO BE FALSE CANNOT WITHSTAND REVIEW UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. This case involves three deaths and at least two co-defendants. As the trial judge candidly acknowledged at co-defendant Wells' sentencing:

**THE COURT:** Let me tell you what the Court's concern is. I know what Mr. Wells' contention is. I sat through one trial of this case. I don't know, I assume all those deputies here did, too; I don't know. Anyway, given what the sentence was in the other case, I know what his contentions are, and I have got some doubts about, you know, who actually did what, based on a lot of what Dr. Burton's testimony was about what bullets did what to whom. Y'all heard the same evidence I did.

(R. 14, plea of co-defendant Wells after Petitioner's death sentence, Judge speaking to prosecutor).

3. It was then, for the first time, that the prosecutor conceded that he had pursued Mr. Lonchar's conviction and death sentence on a theory—dependent upon Wells' story—that was false:

Mr. Wells statement, Your Honor, that he abandoned the enterprise, obviously this Court should take that statement with a grain of salt. Obviously he is in a position where he is going to try to minimize his losses and try to lay the blame on Larry Lonchar.

(R. 50, plea of co-defendant Wells, prosecutor speaking to Court).

4. On information and belief, the prosecution has still to reveal evidence which will demonstrate still more clearly that the conviction and death sentence against Mr. Lonchar were improperly obtained.

## CLAIM VI.

**BY REFUSING TO ALLOW THE INTRODUCTION OF EVIDENCE BY PETITIONER TO CORRECT THE JURORS' MISTAKEN BELIEF OF HOW LITTLE TIME PETITIONER WOULD SERVE IN JAIL IF HE WERE NOT SENTENCED TO DEATH, ANY BY REFUSING TO ANSWER THE JURORS' QUESTION ABOUT THE MEANING OF A LIFE SENTENCE, THE TRIAL COURT VIOLATED PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.**

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. During voir dire, the potential jurors revealed a commonly held belief regarding what is meant by life imprisonment—that a person sentenced to life imprisonment would not be imprisoned for life, but would be released in as little as seven (7) years. For example, potential Juror Comm believed a person sentenced to life would serve "[s]even years or 12 years," (R. 91), potential Juror Pennyman believed it would be "seven years," (R. 115), potential Juror Baker believed it would be "seven years," (R. 404), potential Juror Taylor believed it would be "seven years," (R. 421). Juror Bolton believed life imprisonment meant "just a certain number of years and they are on probation," (R. 99), Juror Jones believed a person could "get out," (R. 164), Juror Hansen believed "they can get out," (R. 249), Juror Kirkpatrick did not think life meant life, (R. 261), and Juror Jimmy Wilson believed life did not mean life, (R. 299). Other potential jurors believed a person sentenced to life imprisonment could "get out," (R. 164), that "some do and some don't," (R. 189), that there was "a chance for parole," (R. 220), that "they could have their sentence reduced," (R. 255), that



"there are some people let out on probation," (R. 339), and that life did not mean life. (R. 262, 286, 295, 428).

3. The problem was recognized by the trial court in Petitioner's case:

THE COURT: They are not going to know if they sentence him to life imprisonment that he is going to be eligible for parole in 30 years.

(R. 1395). However, in refusing to instruct the jury on this crucial issue, the trial court left the jurors floundering in their misperceptions. *See, generally*, Paduano & Smith, *Deathly Errors: Juror Misperceptions Concerning Parole*, 18 COLUM. HUM. RTS. L. REV. 211 (1987) (discussing constitutional implications of jurors' misperceptions concerning parole in Georgia cases).

4. Because the jurors in this case were ignorant of the alternative of life without possibility of parole for at least thirty (30) years—by which time Petitioner would have been over sixty-five (65) years old—defense counsel requested a jury charge that if a defendant was sentenced to three consecutive life sentences, he would be required by Georgia law to serve a minimum of thirty years in prison. (R. 1332). Counsel for the State stipulated that that was the law, and that the members of the Georgia Board of Pardons and Paroles would follow that law in Larry Lonchar's case. (R. 1338, 1361). The state objected to the charge because Georgia law forbids use of the word "parole," but defense counsel did not insist that the word parole be used. (R. 1337). The judge refused the requested instruction, and the proffered testimony. (R. 1361).

4. After considerable deliberation, the jury sent a question to the judge. Then the following record discussion occurred:

THE COURT: The question is: "Does life imprisonment mean—does life imprisonment on each

[of three] count[s] mean the sentence will be served consecutively?" I can't answer the question. That was the question that I received from the jury.

MR. LEIFOLD: My response would be the appropriate answer would be that is within the discretion of the Court, which I think is the truth and a correct response, and I don't think it injects anything into the case.

THE COURT: What do you say?

MR. PETREY: The first response, Your Honor, you can't answer that question. That would be our request on that.

(R. 1457-58). The court refused to answer the sentencer's question. (R. 1465).

5. As a matter of federal constitutional law, the jury should have been instructed accurately on their sentencing alternatives, granted the ample evidence that they were speculating inaccurately. "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 108 S. Ct. at 1986 (*quoting Gardner v. Florida*, 430 U.S. 349, 363-64, 97 S. Ct. 1197, 1207-08, 51 L. Ed. 2d 393 (1977)). As noted previously, the United States Supreme Court has held that "even in a noncapital sentencing proceeding, the sentence must be set aside if the [sentencer] relied at least in part on 'misinformation of constitutional magnitude' . . . ." *Zant v. Stephens*, 462 U.S. at 887 n. 23 (*quoting United States v. Tucker*, 404 U.S. at 447-49).

6. As a matter of Georgia law, certainly when the jury returned with a question they should have been instructed, at a minimum, that such speculation would violate their oaths:

If . . . the jury asks to be instructed about the possibility of parole, the court should mention the issue . . . to the extent of telling the jury in no uncertain terms that such matters are not proper for the jury's consideration.

*Quick v. State*, 256 Ga. 780, 353 S.E.2d 497, 503 (1987) (footnote omitted).

#### CLAIM VII.

BY REFUSING ACCURATELY TO INSTRUCT THE JURY REGARDING WHAT WOULD OCCUR IN THE EVENT A UNANIMOUS DECISION COULD NOT BE REACHED REGARDING SENTENCE—PARTICULARLY WHEN THE JURORS RETURNED TO COURT AND ASKED THAT EXACT QUESTION—THE TRIAL COURT VIOLATED PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. Defense counsel requested that the trial judge instruct the jury, accurately and in accordance with Georgia law, that one verdict they were entitled to return was: "We, the jury, are not able to reach a unanimous verdict." (R. 310, 1393). Unlike the first phase of a capital trial in Georgia, where a non-unanimous verdict is a mistrial that requires retrial, a non-unanimous verdict at capital sentencing is a verdict that results in imposition of a life sentence, *not* resentencing. The requested charge was denied. (R. 1394).

3. After considerable deliberation, the jurors asked a question of the judge:

THE COURT: You are going to love this one: "We'd like you to instruct us as to what we do if we cannot reach a unanimous decision."

(R. 1467). The Court's response to the jury was that he would not accept a decision "at this point," and re refused to answer the jurors' question about what would happen if the jurors were not unanimous.

4. The jurors continued deliberating, and after seven hours could not reach such a decision. Only after coming back the next day—Saturday—were they able to deliver the verdict.

#### CLAIM VIII.

THE FAILURE TO INSTRUCT THE JURY THAT THEIR EVALUATION OF THE EVIDENCE ADDUCED IN MITIGATION MUST BE MADE INDIVIDUALLY DEPRIVED PETITIONER OF HIS RIGHT TO MEANINGFUL CONSIDERATION OF HIS MITIGATING EVIDENCE.

1. All other claims in this petition are incorporated in this claim by reference.

2. No principle of Eighth Amendment law can be clearer than the requirement that jurors be required to consider any evidence proffered by the defense in mitigation. *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Bell v. Ohio*, 438 U.S. 637, 98 S. Ct. 2977, 57 L. Ed. 1010 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982).

3. In this case, not only were the jurors not told that they *could* make a non-unanimous finding which would result in a life sentence, *see, supra*, § V, but they were also not told that they *must* individually evaluate the evidence in mitigation, in light of the aggravating circumstances.



## CLAIM IX.

BY PEREMPTORILY AND DISCRIMINATORILY EXCUSING FOUR BLACK JURORS, THE PROSECUTOR VIOLATED PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. The prosecutor peremptorily challenged four black female jurors—Anna Pennyman, Annie Harris, Deirdre Copeland, and Mildred Baker. The prosecutor gave no reason for the excusal of these jurors.

3. The prosecutor's discriminatory excusal of black potential jurors violated Petitioner's constitutional rights to be tried by a jury comprised of a fair cross-section of the community, to reliable fact-finding determinations, and to equal protection, guaranteed by the sixth, eighth, and fourteenth amendments.

## CLAIM IV.

DEFENSE COUNSEL UNREASONABLY AND PREJUDICIALLY FAILED PROPERLY TO INVESTIGATE AND PRESENT HIS CLIENT'S BACKGROUND AND MENTAL STATE, WITH THE RESULT THAT EVIDENCE OF INSANITY, INCOMPETENCY, INVALID WAIVERS OF CONSTITUTIONAL RIGHTS, AND COMPELLING EVIDENCE IN MITIGATION OF PUNISHMENT WAS NOT PRESENTED, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

This claim is evidenced by the following facts:

1. All other allegation in this petition are incorporated into this claim by specific reference.

2. Defense counsel was repeatedly put on notice that Larry Lonchar's mental condition was, or should have been, a significant factor in his trial and sentencing. Counsel did have Larry Lonchar "evaluated" (incompetently) seven months before trial and sentencing, but 1.) he neither gathered nor provided any background information to the evaluator, information that was critical for a proper diagnosis; 2.) that evaluation was *per se* insufficient, based as it was primarily on a simple mental status exam and upon an incomplete and invalid psychological assessment; 3.) that evaluation occurred seven months or more before trial, and no further evaluation occurred, 4.) the evaluation did not address mitigating circumstances, or ability to waive constitutional rights, and 5.) the "psychiatrist" did not know about the documented jail-house mental health problems, about the parole officer's concern pre-offense about Larry Lonchar's psychiatric condition, or that previous prison records revealed and documented Larry Lonchar's psychiatric disorders. Because of trial counsel's inadequate preparation and performance, Petitioner's right to effective assistance of counsel and to a competent mental health evaluation was violated.

3. *After* this singularly inadequate evaluation was conducted, counsel learned: a.) that his client did not trust him, had not cooperated with him, and intended to act in manner that was not in his best interest; b.) that his client would and did refuse to attend his own trial; c.) that his client had received psychiatric treatment in the past, and, d.) that petitioner's natural mother was mentally ill, and had been for most of Petitioner's life.

4. Counsel also know that after the offense his client "[w]as white as a sheet, his eyes were big around, sticking out of his head," (R. 908) that when he was arrested he exhorted the arresting officer to "Go ahead and shoot me. Shoot me," and "Go ahead and kill me, kill me." (R. 1002). He knew that when his client was interro-

gated, he told the police "he was going to plead guilty and die in the chair," he was "very upset," and "he began shaking and trembling." (R. 1061, 1075).

5. Counsel also knew, or should have known, that Petitioner's parole officer immediately before the offense recognized that Petitioner was in need of mental health intervention, and scheduled such treatment. The offense occurred two days before the scheduled appointment (R. 206).

6. With the new information he *did* have, counsel was obligated to ensure that Petitioner was properly evaluated. Counsel was obligated *ab initio* to ensure that a competent mental health evaluation occurred, but certainly by the time of trial and/or sentencing counsel should have known that the issue had to be addressed again, and *properly*. Counsel failed to address the issue, to his client's clear prejudice.

7. As an indigent whose mental status was at issue during all phases of his trial and capital sentencing proceeding, Mr. Lonchar was entitled to assurance by counsel that he would receive a competently conducted psychiatric evaluation. *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Ake* deals with the state's obligation in a criminal case "to assure that the defendant has a fair opportunity to present his defense." In *Ake*, the Supreme Court held that "the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition," when the defendant's mental health is at issue. *Id.* at 70. The Court, after discussing the potential help that might be provided by a psychiatrist, stated:

We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, *assure the defendant*

*access to a competent, psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.* This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a *competent psychiatrist* for the purpose we have discussed, and as in the case of the provision of counsel we leave to the states the decision on how to implement this right.

*Id.* at 83 (emphasis added). This holding recognized the entitlement of an indigent defendant, not only to a "competent" psychiatrist (i.e., one who is duly qualified to practice psychiatry), but also to a psychiatrist who performs competently, that is, one who conducts a professionally competent examination of the defendant and who on this basis provides professionally competent assistance.

8. Due process requires the state to make available mental health experts for indigent defendants, because "the potential accuracy of the jury's determination is . . . dramatically enhanced" by providing indigent defendants with competent psychiatric assistance. *Id.* at 81-83. In this context, the Court clearly contemplated that the right of "access to a competent psychiatrist who will conduct an appropriate examination," would include access to a psychiatrist who would conduct a professionally competent examination. To conclude otherwise would make the right of "access to a competent psychiatrist" an empty exercise in formalism.

9. In *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985), the court recognized that the defendant's right to effective assistance of counsel was impaired by the State's withholding of evidence "highly relevant, or psychiatrically significant, on the question of [defendant's] sanity" from the psychiatrist who was ordered to evaluate the defend-



ant's sanity. 758 F.2d at 532. Even though that evidence was disclosed to the psychiatrist on the witness stand at trial, "[o]bviously, he was reluctant to give an opinion when confronted with this information for the first time on the witness stand. . . . This was hardly an adequate substitute for a psychiatric opinion developed in such a manner and at such a time as to allow counsel a reasonable opportunity to use the psychiatrist's analysis in the preparation and conduct of the defense." *Id.* at 532 n.10, 533.<sup>10</sup>

10. Similarly, in *Mason v. State*, 489 So.2d 734 (Fla. 1986), the Florida Supreme Court recognized that the due process clause entitles an indigent defendant not just to a mental health evaluation, but also to a professionally valid evaluation. Because the psychiatrists who evaluated Mr. Mason pre-trial did not know about his "extensive history of mental retardation, drug abuse and psychotic behavior," or his history "indicative of organic brain damage," and because the court recognized that the evaluations of Mr. Mason's mental status would be flawed if the physicians had "neglect[ed] a history" such as this, the court remanded Mr. Mason's case for an evidentiary hearing. *Id.* at 735-37.

11. Courts have recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel. The due process

<sup>10</sup> Although the *Blake* court analyzed the impairment of the psychiatrist's ability to conduct a professionally adequate evaluation in terms of its impact on the right to effective assistance of counsel, it recognized that its analysis was "fully supported" by *Ake*. In support of this conclusion, the court gave emphasis to *Ake*'s requirement that "the state must at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and in presentation of the defense." 758 F.2d at 530-31 (quoting *Ake*, 470 U.S. at 83). Thus, *Blake* recognized that if an appointed psychiatrist's ability to "conduct an appropriate examination" is impaired, because of counsel's or the State's actions, due process is violated.

clause requires that appointed psychiatrists render that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances. In psychiatry, as in other medical specialties, the standard of care is the national standard of care recognized among similar specialists, rather than a local, community-based standard of care. We will show that had counsel or his chosen evaluators seven months before trial and through the time of sentencing acted competently, there is a reasonable probability the result in this case would have been different.

#### A. *The Proper Standard of Care Involves a Five Step Process Before Diagnosis*

In the context of diagnosis, exercise of the proper level of care, skill and treatment requires adherence to the procedures that are deemed necessary to render an accurate diagnosis. On the basis of generally-agreed principles, the standard of care for both general psychiatric and forensic psychiatric examination reflects the need for a careful assessment of medical and organic factors contributing to or causing psychiatric or psychological dysfunction. H. Kaplan & B. Sadock, *Comprehensive Textbook of Psychiatry* 543 (4th ed. 1985). The recognized method of assessment, therefore, must include the following steps.

##### 1. *An accurate medical and social history must be obtained*

Because "[i]t is often only from the details in the history that organic disease may be accurately differentiated from functional disorders or from a typical lifelong patterns of behavior," R. Strub & F. Black, *Organic Brain Syndromes* 42 (1981), an accurate and complete medical and social history has often been called the "single most valuable element to help the clinician reach an accurate diagnosis." Kaplan & Sadock at 837.

2. *Historical data must be obtained not only from the patient, but from sources independent of the patient*

It is well recognized that the patient is often an unreliable and incomplete data source for his own medical and social history. "The past personal history is somewhat distorted by the patient's memory of events and by knowledge that the patient obtained from family members." Kaplan & Sadock at 488. Accordingly, "retrospective falsification, in which the patient changes the reporting of past event or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." *Id.* Because of this phenomenon,

[I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The through forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 Va. L. Rev. 427 (1980). Accord Kaplan & Sadock at 550; American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," *Issues in Forensic Psychiatry* 202 (1984); Pollack, *Psychiatric Consultation for the Court*, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1974); H. Davison, *Forensic Psychiatry* 38-39 (2d ed. 1965).

3. *A thorough physical examination (including neurological examination) must be conducted*

See, e.g., Kaplan & Sadock at 544, 837-38 & 964. Although psychiatrists may choose to have other physicians conduct the physical examination, psychiatrists

[s]till should be expected to obtain detailed medical history and to use fully their visual, auditory and olfactory senses. Loss of skill in palpation, percussion, and auscultation may be justified, but loss of skill in observation cannot be. If the detection of nonverbal psychological cues is a cardinal part of the psychiatrists' function, the detection of indications of somatic illness, subtle as well as striking, should also be part of their function.

Kaplan & Sadock at 544. In further describing the psychiatrists' duty to observe the patient s/he is evaluating, Kaplan and Sadock note in particular that "[t]he patient's face and head should be scanned for evidence of disease. . . . [W]eakness of one side of the face, as manifested in speaking, smiling, and grimacing, may be the result of focal dysfunction of the contralateral cerebral hemisphere." *Id.* at 545-46.

4. *Appropriate diagnostic studies must be undertaken in light of the history and physical examination*

The psychiatric profession recognizes that psychological tests, CT scans, electroencephalograms, and other diagnostic procedures may be critical to determining the presence or absence of organic damage. In cases where a thorough history and neurological examination still leave doubt as to whether psychiatric dysfunction is organic in origin, psychological testing is clearly necessary. See Kaplan & Sadock at 547-48; Pollack at 273. Moreover, among the available diagnostic instruments for detecting organic disorders, neuropsychological test batteries have



proven to be critical, as they are to be valid and reliable diagnostic instruments available. See Filskov & Goldstein, *Diagnostic Validity of the Halstead-Reitan Neuropsychological Battery*, 42 J. of Consulting & Clinical Psych. 382 (1974); Schreiber, Goldman, Kleinman, Goldfader, & Snow, *The Relationship Between Independent Neuropsychological and Neurological Detection and Localization of Cerebral Impairment*, 162 J. of Nervous and Mental Disease 360 (1976).

5. *The standard mental status examination cannot be relied upon in isolation as a diagnostic tool in assessing the presence or absence of organic impairment*

As Kaplan and Sadock have explained, "[C]ognitive loss is generally and correctly conceded to be the hallmark of organic disease," and such loss can be characterized as "(1) impairment of orientations; (2) impairment of memory; (3) impairment of all intellectual functions, such as comprehension, calculation, knowledge, and learning; and (4) impairment of judgment." *Id.* at 835. While the standard mental status examination (MSE) is generally used to detect and measure cognitive loss, the standard MSE—in isolation from other evaluative procedures—has proved to be very unreliable in detecting cognitive loss associated with organic impairment. Kaplan and Sadock have explained why:

When cognitive impairment is of such magnitude that it can be identified with certainty by a brief MSE, the competent psychiatrist should not have required the MSE for its detection. When cognitive loss is so mild or circumscribed that an exhaustive MSE is required for its recognition then it is likely that it could have been detected more effectively and efficiently by the psychiatrists's paying attention to other aspects of the psychiatric interview.

In order to detect cognitive loss of small degree early in its course, the psychiatrist must learn to attend more to the style of the patient's communication than to its substance. In interviews, these patients often demonstrate a lack of exactness and clarity in their descriptions, some degree of circumstantiality, a tendency to perseverate, word-finding problems or occasional paraphasia, a paucity of exact detail about recent circumstances and events (and often a lack of concern about these limitations) or sometimes an excessive concern with petty detail, manifested by keeping lists or committing everything to paper. The standard MSE may reveal few if any abnormalities in these instances, although abnormalities will usually be uncovered with the lengthy MSE protocols.

The standard MSE is not, therefore, a very sensitive device for detecting incipient organic problems, and the psychiatrist must listen carefully for different cues.

*Id.* at 835. Accordingly, "[c]ognitive impairment, as revealed through the MSE, should never be considered in isolation, but always should be weighed in the context of the patient's overall clinical presentation—past history, present illness, lengthy psychiatric interview, and detailed observations of behavior. It is only in such a complex context that a reasonable decision can be made as to whether the cognitive impairment revealed by MSE should be ascribed to a organic disorder or not." *Id.* at 836.

In sum, the standard of care within the psychiatric profession which must be exercised in order to diagnose is most concisely stated in Arieti's *American Handbook of Psychiatry*:

Before describing the psychiatric examination itself, we wish to emphasize the importance of placing it within a comprehensive examination of the whole

patient. This should include a careful history of the patient's physical health together with a physical examination and all indicated laboratory test. The inter-relationships of psychiatric disorders and physical ones are often subtle and easily overlooked. Each type of disorder may mimic or conceal one of the other type. . . . A large number of brain tumors and other diseases of the brain may present as "obvious" psychiatric syndromes and their proper treatment may be overlooked in the absence of careful assessment of the patient leading him to the diagnosis of physical illness. Indeed, patients with psychiatric disorders often deny the presence of major physical illnesses that other persons would have complained about and sought treatment for much earlier.

*Id.* at 1161.

B. *Had Petitioner Received A Competent And Reliable Mental Health Evaluation Based Upon A Proper Standard of Care, There Is A Reasonable Probability That The Result In This Case Would Have Been Different*

1. Social And Medical History
2. Historical Data, Independent From Client

Defense counsel provided no or grossly insufficient background information to the examiner, especially evidence independently gathered. The appendix is replete with evidence that could have been found, some of which will be detailed here.

a. *Petitioner's Tragic Upbringing*

As Dr. Phillips' report details, and as supported by the affidavits of family members, Petitioner's upbringing was a frightening and dangerous experience. His home situation was marked by violent, lurid, drunken, and insane battles

between parents, and by abandonment, neglect, abuse, and deprivation. Dr. Phillips' report provides an encapsulation of the horror:

The strain of Chooch's [Petitioner's brother's] poor health on parents Elsie and Milan was immense. Milan was working as a brakeman on the Battlecreek/Chicago line and started staying out nights to drink and gamble with other railroad workers. Milan's drunkenness was accompanied by what has been described as "uncontrollable and violent rages." During those early years of marriage before the children, if Elsie was present she received the brunt of the violence. If she wasn't present, furniture and kitchen utensils served to absorb the anger. It was during this period that Elsie began disassociating herself from family and home, learning to be both physically and emotionally distant as possible from family life.

The children described their mother as a woman who "drank Coca-Cola all day long and ironed." They recall her buying cases of Coke and setting them next to the ironing board with a bottle opener. She used to open bottle after bottle, like a chain smoker would cigarettes. It was not until later years that the children came to realize that mother was washing a multitude of prescription pills down with the Cokes. It was not long thereafter that she had foregone the Cokes for liquor.

The children knew their father was a drinker even in the early years because when their father was home in Battlecreek, they were constantly being sent to fetch him home from one of the neighborhood taverns down the street. If the children failed to recover their dad, mother would do the task. Larry recalls



his mother's usual success in getting his father home. After a while, however, she started going up to the tavern and staying. By the end of the day, the children would go up to the tavern to find both parents and grandparents drunk.

Mr. Lonchar and his sibling remember innumerable occasions when their father became violent after drinking. Initially, most of the father's violence was directed more at their grandmother Victoria—usually when both had been drinking. It was not uncommon for the arguments to escalate from verbal altercations to physical violence necessitating the children calling the police. Such a scenario was a regular occurrence at the Lonchar household with the police being called initially because of fights between the father and grandmother and subsequently the husband and his wife.

When his father drank as stated above, he tended to beat his wife more than anyone else in the family. Larry remembers several occasions night after night in which the children were awakened from their sleep in the basement to the sounds of angry and fearful screaming. Invariably, they would run upstairs only to find their father holding their mother by the hair and punching her in the face with his fists over and over. The children, Tiny in particular, would ultimately decide whether or not to call the police. That equation was driven by a decision according to whether or not they thought their father would pass out before he might happen to kill his wife.

Larry graduated from grammar school and entered South Eastern Junior High School as a seventh grader

in 1965. As he grew older, his mother reports that he began to have "the most incredible temper tantrums you've ever seen." She also reported noting his "eyes rolling back in his head." She always attached the episodes of eye movements to Larry's temper tantrums. She also recalls that on one occasion he hit her during one of these tantrums. Several days later she brought it to his attention and he responded as if she were joking. She could hardly convince him that he had actually hit her and to this day believes Larry was not aware of his actions at that time.

During mid-year of the eighth grade, Larry was expelled from school for calling one of his teachers "you old bitch" after she made him leave her classroom. Larry was sent to juvenile court, adjudicated delinquent and was committed to Marshall Juvenile Home in Marshall, Michigan. It was approximately during this time frame that Elsie Lonchar suffered her first psychotic decompensation and was admitted to the Battlecreek Sanatorium where she remained approximately 10 days and was discharged on (Mellaril). Upon her release she requested and obtained disability payments for psychiatric disability as well as the problem with her feet.

Shortly thereafter she divorced her husband and took custody of all four children. Although her husband was ordered by the court to pay child care payments of \$50.00 per week per child, he did not make a single payment and as such she raised her children on welfare.

The divorce was apparently a crushing blow for Larry. It was years before he accepted the material fact that his parents were divorced, and he has never fully given up on his desire to see them reunited. Even when he was an adult in prison, he would write

his mother asking her when she would reunite with his father.

(Appendix A to Petition in *Kellogg v. Zant*, Butts Co. Civil Action No. 90-V-2735)

Had counsel properly looked into Petitioner's prior incarceration records, he would have discovered documented state recognition of Petitioner's mental illness. Those records document Larry's difficult, violent, and chaotic adolescence, his "unexplained" psychiatric turn at about age 14, and his subsequent impulsive behavior throughout the rest of his life.

As already discussed, but here, as revealed in records, Larry was born September 3, 1951, in Battle Creek, Michigan. He lived with his parents, grandparents, and siblings in a small brick house in an inter-racial neighborhood. His mother was and is mentally ill, and has taken psychotropic medication for years by prescription. His father was and is an alcoholic. He abused Larry and his mother, psychologically and physically, while Larry was growing up. See 4/20/71 Report; 4/21/78 Report, App. E to Petition in *Kellogg v. Zant*, Butts County Civil Action No. 90-V-2735).

Larry was nevertheless an above average student until the eighth grade. "Then, very suddenly, [he] began to have serious problems." Report, 1/1/76, p. 5, *id.* Truancy, disruptive behavior, inappropriate behavior, and criminal behavior followed. Starting at age 14-16, he spent the rest of his life in either juvenile facilities or prison, with brief interludes on parole, usually with his mentally ill mother. According to his mother, according to defense records (which counsel failed to follow up), and according to prison records, Larry was committed to a "sanitarium" at age 15 (see 12/24/69 Report, "BTS 1966") and was constantly in and out of juvenile facilities thereafter.

#### b. Later Mental health treatment.

Because of a series of offenses in 1969, Larry was arrested as an adult. His mother advised that he was in need of psychiatric treatment. He was evaluated by Dr. Myron A. Tazelaar, M.D., with reference to sentencing alternatives and based on that evaluation, the probation agent concluded that: "In view of his [Dr. Tazelaar's] remarks and all of the other factors taken into consideration . . . I do not feel at the present there is anything that we have to offer" other than jail, "so that Larry can be protected from himself . . ." Report 12/17/69. Other reports show:

- 1/12/70 clinical psychologist's test results—Larry "has no idea as to why he follows his impulses without logic or apparent reason"
- 4/28/71 Mrs. Lonchar suffers from nerves and other ailments and takes tranquilizers in rather large quantities
- 1/21/76 "rap sheet"; dad was strict disciplinarian, spankings
- 5/28/75 psychoneurotic symptoms; plagued with feelings of insecurity and inadequacy grossly disproportionate to his realistic situation; impulsive, dangerous, highly instable, homicidal; needs intensive psychotherapy
- 7/9/76 multiple offender who has demonstrated impulsive and erratic behavior
- 4/20/78 very nervous; high anxiety level
- 4/21/78 father was an abusive drinker, and beat upon defendant's mother as well as the defendant and siblings; "Therefore, at . . . age 13, . . . he began to escape to the streets."; free floating anxiety and raw nerves; a pattern of dealing with a hated self by periods of frenzied activity; totally bewildered and sick at heart; tragic nature of self-destruction pattern



5/31/78 "emotional and physical abuse during formative years; needs intensive psychotherapy;" very frightened and anxious; acts out very impulsively; "it is very unlikely that he would callously harm others"; immature, insecure, frightened, anxious, emotionally confused.

(Appendix E to Petition in *Kellogg v. Zant*, Butts County Civil Action No. 90-V-2735).

Finally, as already discussed in Claim III, *supra*, jail records maintained before and during trial reveal that jail personnel believed Petitioner was psychiatrically ill, they wished to medicate him, and he was constantly placed on suicide watch. (*Id.*)

### 3. Proper Physical And Neurological Exam

Dr. Phillips conducted a physical and neurological examination of Petitioner, resulting in the discovery of evidence of neurological brain damage. As his report reveals:

Finally, I am of the opinion, within a reasonable degree of medical certainty, that there exists both supportive clinical and historical evidence at the time of my examination, making the indications rather high that Mr. Lonchar has underlying brain damage as manifested by abnormal pupillary dilation, bilateral single beat nystagmus, in the face of historical evidence of significant head trauma and possible seizure disorder. Such brain damage would further substantially contribute to rendering this individual less effective in meeting the standards expected for his age.

(Appendix A to Petition in *Kellogg v. Zant*, Butts County Civil Action No. 90-V-2735).

It is clear that the examination prior to Mr. Lonchar's trial missed all the physiological indicators of his mental illness, apparent even to a lay person such as his sister, Christine.

### 4. Proper Diagnostic Studies

&

### 5. Mental Status Exam

While Mr. Lonchar was briefly examined by a psychologist seven months before trial, that psychologist himself acknowledged that he gave few tests to Petitioner, and that those few were mostly invalid. Mr. Lonchar was also briefly evaluated by a psychiatrist seven months before trial, who conducted a mental status exam.

Had Petitioner's counsel conducted a background investigation, documented Petitioner's history of mental illness and his mental illness in the jail, and had proper physical, neurological, and diagnostic exams been performed rather than relying almost exclusively upon a mental status exam, there is a reasonable probability that the result in this case would have been different. Incompetency and invalid waivers have already been discussed in Claims II and III, *supra*. In addition, compelling evidence in mitigation of punishment would have resulted. Defense counsel presented evidence only from the defendant's father at trial, because he had conducted not investigation. The family members whose affidavits appear at Appendix B-D to the Petition in *Kellogg v. Zant*, Butts County Civil Action No. 90-V-2735, would gladly have talked to trial counsel and been available at sentencing, and all the records discussed above were available. Counsel unreasonably failed to develop this information.

When counsel unreasonably fails to properly investigate competency, *Speady v. Wyrick*, 702 F.2d 723 (8th Cir. 1983); *Adams v. Wainwright*, 764 F.2d 1356 (11th Cir. 1985); *United States v. Edwards*, 477 F.2d 1154 (5th Cir. 1974), insanity and diminished capacity, *Beavers v. Balkcom*, 636 F.2d 114 (5th Cir. 1981); *Davis v. Alabama*, 596 F.2d 1214 (5th Cir. 1979), or mental circumstances relevant to sentencing, *Blake v. Kemp*, 758

F.2d 523 (11th Cir. 1985), the result must be ineffective assistance of counsel.

The sixth amendment right to counsel is inextricably tied to the right to expert psychiatric assistance. There is in fact a critical dependency between the right to effective assistance of counsel and the separate right to competent mental health assistance for a criminal defendant. Mental health experts are essential for the preparation of a defense and for sentencing whenever the State makes mental health relevant to those issues. *Ake v. Oklahoma*, 105 S.Ct. 1087 (1985). This independent due process right is necessarily enforceable through the right to effective counsel—a competent mental health evaluation is required, and it is up to counsel to obtain it. *Blake v. Kemp*, 758 F.2d 523, 529 (11th Cir. 1985).

It would *never* be appropriate to accede to the demands of a client when the client has not had the benefit of adequate advice, founded on independent investigation and evaluation. Advice requires investigation, and a client's decisions must be made *after* proper counsel. "Uncounseled jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better informed advice." *Martin v. Maggio*, 711 F.2d 1273, 1280 (5th Cir. 1983). "After informing himself fully on the facts of law, the lawyer should advise the accused . . . ." *Defense Function*, 5.1(a). Decisions made by clients without advice based on independent investigation are decisions made without "the guiding hand of counsel." *Powell v. Alabama*, 287 U.S. 45 (1932). "Under any professional standard, it is improper for counsel to blindly rely on the statement of a criminal client whose reasoning abilities are highly suspect." *Brennan v. Blankenship*, 472 F.Supp. 149, 156 (D.C. W.D. Va. 1979)

## CLAIM XI.

### PETITIONER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT AND *STRICKLAND v. WASHINGTON*.

1. Petitioner hereby specifically incorporates by reference all the allegations which have been made above.
2. Petitioner specifically incorporates into this section any deficiency alleged by the State regarding counsel's failure to preserve issues arising out of the violation of Petitioner's rights at his trial for appellate review.
3. Trial counsel failed to develop and present the defense that Co-defendant Wells and another co-defendant were responsible for the killings, as the chief eye-witness testified, and that this was against Mr. Lonchar's expectations and desire.
4. Trial counsel failed adequately to investigate and impeach the story put out by co-defendant Wells.
5. Trial counsel failed adequately to develop and present evidence at the penalty phase concerning Mr. Lonchar's state of mind.
6. Trial counsel failed to locate and present Mr. Lonchar's many friends who, as potential witnesses at the penalty phase, could have testified to Mr. Lonchar's many redeeming qualities. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). Counsel failed to secure and present critical evidence relating to Petitioner's history of incarceration which would have negated the effect of the illegitimate introduction of Petitioner's prior convictions. See, *supra*, Section II. As a consequence, the jury was precluded from evaluating important evidence of Petitioner's potential for adapting to the prison environment. See *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986).



## CLAIM XII.

PETITIONER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL IN VIOLATION OF THE SIXTH AMENDMENT AND *EVITTS v. LUCEY*.

1. Petitioner hereby specifically incorporates by reference all the allegations which have been made above.
2. Petitioner hereby specifically alleges that he received ineffective assistance of counsel with respect to each issue which the State alleges was omitted or improperly preserved on his direct appeal to the Georgia Supreme Court. See *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

## CLAIM XIII.

THE DENIAL OF PETITIONER'S RIGHT TO A PUBLIC TRIAL VIOLATED THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS STATE LAW.

1. Petitioner hereby specifically incorporates by reference all the allegations which have been made above.
2. The courtroom was cleared of spectators and the press when the jury reported the sentence in this case, and the sentence was kept sealed for two days, in violation of his right to a public trial.

## CLAIM XIV.

THE SENTENCERS IMPROPERLY WERE ALLOWED TO IMPOSE DEATH VIA AN AGGRAVATING CIRCUMSTANCE THAT WAS UNAVAILABLE UNDER GEORGIA LAW, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

This claim is evidenced by the following facts:

1. All other allegations in this Amendment and in the initial petition are incorporated into this claim by specific reference.

2. The sentencers were instructed that each offense in this case served as aggravation for the other two offenses, contrary to the law in Georgia. The jury found this aggravation, as they were instructed they could.

3. At sentencing, the prosecutor argued:

You have to find that this murder occurred, or these three murders, occurred when the defendant was in the process of committing another kind of capital felony, such as murder. That is present in this case.

(R. 1403).

4. The jury was instructed:

Under the laws of the state of Georgia the following may constitute statutory aggravating circumstances: First, where the offense of murder was committed while the defendant was engaged in the commission of another capital felony or aggravated battery . . . . [I]n this connection, the offense of murder as (sic) a capital felony under our law.

(R. 1437).

5. The jurors found two statutory aggravating circumstances for each offense: 1.) "the offense of murder was committed while the offender was engaged in the commission of another capital felony and aggravating battery," (R. 248-50), and 2.) that the offense was outrageously and wantonly vile, horrible and inhuman. See Claim XIV, *infra*.

6. Under Georgia law, two offenses may not aggravate each other. *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974). The death sentences were imposed in an arbitrary manner because the jury was allowed to act in a way different from other jurors in other cases, in violation of the Eighth and Fourteenth Amendments. Appellate counsel unreasonably and prejudicially failed to raise this claim on direct appeal, in violation of Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

## CLAIM XV.

GEORGIA'S STATUTORY AGGRAVATING CIRCUMSTANCES "OUTRAGEOUSLY AND WANTONLY VILE, HORRIBLE AND INHUMAN" WAS UNCONSTITUTIONALLY APPLIED IN THIS CASE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

This claim is evidenced by the following facts:

1. All other allegations in this Amendment and in the original petition are incorporated into this claim by specific reference.
2. Petitioner's jury was instructed that it could impose death if it found the offense "was outrageously or wantonly vial [sic], horrible or inhuman and, second, that it involved at least one of the following: Torture or depravity of mind or an aggravated battery to the victim." (R 1438-39) (emphasis added). This aggravating circumstance required the finding of two things: 1.) outrageously or wantonly vile, horrible or inhuman and 2.) torture, or depravity of mind, or an aggravated battery.
3. No definition of the phrase "outrageously or wantonly vile, horrible, or inhuman" was given. No evidence of torture existed, and any aggravated battery inhered in the crime.
4. In *Gregg v. Georgia*, 428 U.S. 153, 201 (1976), the Supreme Court of the United States ruled that, although this aggravating circumstance, O.C.G.A. § 17-10-30(b)(7) was not unconstitutional on its face, the statutory language could be subject to unconstitutional abuse if the Georgia Supreme Court were to adopt an open ended construction of its terms. Four years later, the United States Supreme Court again had the opportunity to construe the constitutionality of (b)(7) in *Godfrey v. Georgia*, 446 U.S. 420 (1980). The Court in *Godfrey* concluded that under the facts in that case, the application

of (b)(7) was not kept within the ambit of constitutional acceptability. Petitioner in the present case maintains that the application of (b)(7) to the facts of his case does not meet the constitutional requirements espoused in *Gregg v. Georgia* and *Godfrey v. Georgia*, *supra*.

5. In *Godfrey v. Georgia*, the Court noted that the Georgia Supreme Court had in other decisions placed the necessary limiting construction on the statute sufficient to bring it within constitutional acceptability. See *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976); *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637 (1977). But in *Godfrey*, where the jury returned a verdict essentially in the language of the statute, the jury's finding of the (b)(7) aggravating factor was found unconstitutional. The Court noted that (b)(7) is worded in the disjunctive and thus permits the jury to sentence a defendant to death on finding that the crime evidenced either torture or depravity of mind or aggravated battery. The jury's finding in *Godfrey* did not make it apparent which, if any of these factors, it had relied upon in sentencing the defendant to death. The *Godfrey* Court held that the death penalty may not be imposed under sentencing procedures which create a substantial risk that punishment will be inflicted in an arbitrary and capricious manner. See *Furman v. Georgia*, 408 U.S. 238 (1972). The jury must be given specific and detailed guidance, and the procedure must afford a reviewing court the ability to interpret the jury's finding. Because in *Godfrey* there was no evidence to suggest the victims had been tortured or physically abused by the defendant before death, the Court found that there was no way to distinguish that case in which the death penalty was imposed from many other cases in which it was not. *Godfrey*, 446 U.S. at 433.

6. Subsequently, in *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980), the Georgia Supreme Court defined torture as the victim being subjected to serious physical



abuse before death. Further, that court delineated serious physical abuse as being both sexual as well as psychological abuse. Additionally, the court defined torture as having occurred in an aggravated battery. In *Phillips v. State*, 250 Ga. 336, 297 S.E.2d 217 (1982), the Georgia Supreme Court stated:

(a) We have recognized the possibility that the (b)(7) aggravating circumstance can be abused. *Harris v. State*, 237 Ga. 718, 732, 230 S.E.2d 1 (1976). Section (b)(7) is less specific and objectively measurable than the other statutory aggravating circumstances. Its purpose is to reach those extraordinary murders, involving the unnecessary wanton infliction of pain and suffering or depravity of mind, which merit the ultimate penalty under our law. The section may not, however, be interpreted so broadly that it can be applied to every murder; in that event, the requirement that the sentence of death may not be imposed unless at least one statutory aggravating circumstance is found, could not serve its intended purpose of helping to distinguish cases in which the death penalty is imposed from the many cases in which it is not. As we stated in *Harris v. State*, *supra*, we have no intention of permitting the statutory aggravating circumstance to become a 'catch all' for cases simply because no other statutory aggravating circumstance is raised by the evidence.' 237 Ga. at 132, 230 S.E.2d 1 at 10.

7. Further, the Georgia Supreme Court noted in *Phillips v. State*, *supra*, that the mere apprehension of death immediately before the fatal wounds are inflicted does not amount to serious psychological abuse prior to death. That court reemphasized its holding that to uphold a finding under (b)(7), the defendant must "inflict deliberate, offensive and prolonged pain on his victim prior to death."

8. The jury in this case was *not* informed what vile, horrible, and inhuman meant. Further, in the present case, the facts and evidence do not support the jury's finding under a constitutionally valid interpretation of O.C.G.A. § 17-10-30(b)(7).

9. As the Georgia Supreme Court noted in *Whittington v. State*, 252 Ga. 168, 313 S.E.2d 73, 82 (1984), and the United States Supreme Court noted in *Godfrey*, 446 U.S. at 432-33, pain and suffering is an inevitable by-product of any murder. What (b)(7) condemns is the unnecessary and wanton infliction of pain; not just the pain which results as a matter of course in the commission of a murder. Even serious physical and psychological abuse are insufficient unless it is proved that the defendant inflicted deliberate offensive and prolonged pain on his victim prior to death. *Phillips v. State*, 250 Ga. 336, 297 S.E.2d 217, 221. For there to be torture, there must be evidence that the torture was deliberate, that the torture was intentional, and not merely that the victim had in fact suffered prolonged pain prior to death. *Whittington v. State*, 252 Ga. 168, 313 S.E.2d at 82. Clearly, in the present case, no evidence was supplied to the trier of fact to show that the defendant intended to inflict deliberate, offensive and prolonged pain prior to death.

10. The death sentence in this case violates the Sixth, Eighth, and Fourteenth Amendments, and appellate counsel provided ineffective assistance by unreasonably and prejudicially failing to raise this issue upon direct appeal.

## CLAIM XVI.

THE DEATH PENALTY IN THIS CASE WAS IMPOSED PURSUANT TO AN UNCONSTITUTIONAL STATUTE THAT PRODUCES DEATH SENTENCES THAT STRIKE LIKE LIGHTNING BASED UPON IMPROPER CRITERIA SUCH AS THE RACE OF THE VICTIM, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

This claim is evidenced by the following facts:

1. All other allegations in this Amendment and in the original petition are incorporated into this claim by specific reference.

2. The United States General Accounting Office (GAO) released a study last month establishing that the death penalty in the United States strikes like lightning, and that it is arbitrarily and discriminatorily imposed. A statute that produces such results is an unconstitutional statute, and any sentence imposed pursuant to such a statute violates the Eighth and Fourteenth Amendments. *Furman v. Georgia*, 408 U.S. 238 (1972).

3. According to the GAO report, attached hereto:

In 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques. The finding held for high, medium, and low quality studies.

The race of victim influence was found in all stages of the criminal justice system process, although there were variations among studies as to whether there

was a race of victim influence at specific stages. The evidence for the race of victim influence was stronger for the earlier stages of the judicial process (e.g., prosecutorial decision to charge defendant with a capital offense, decision to proceed to trial rather than plea bargain) than in later stages. This was because the earlier stages were comprised of larger samples allowing for more rigorous analyses. However, decisions made at every stage of the process necessarily affect an individual's likelihood of being sentenced to death.

Legally relevant variables, such as aggravating circumstances, were influential but did not explain fully the racial disparities researchers found. In the high or medium quality studies, researchers used appropriate statistical techniques to control for legally relevant factors, e.g., prior criminal record, culpability level, heinousness of the crime, and number of victims. The analyses show that after controlling statistically for legally relevant variables and other factors thought to influence death penalty sentencing (e.g., region, jurisdiction), differences remain in the likelihood of receiving the death penalty based on race of victim.

4. Petitioner was charged with offenses against white persons. During jury selection, the prosecutor intentionally and discriminatorily excluded certain black potential jurors from serving. *See* Claim IX, Original Petition.

5. The death sentence in this case was imposed pursuant to a statute that allows the race of the victim to be a compelling factor in imposing death, in violation of the Eighth, and Fourteenth Amendments.



## CLAIM XVII.

THE TRIAL COURT EXCUSED FOR CAUSE POTENTIAL JURORS ON THE BASIS OF ALLEGED OPPOSITION TO THE DEATH PENALTY, ALTHOUGH THE JURORS' VIEWS EXPRESSED DURING VOIR DIRE NEITHER PREVENTED THEM FROM CONSIDERING, NOR SUBSTANTIALLY IMPAIRED THEIR ABILITY TO CONSIDER, IMPOSING A DEATH SENTENCE, AND THE TRIAL COURT CONDUCTED VOIR DIRE ON THIS ISSUE IN A CONSTITUTIONALLY IMPERMISSIBLE MANNER, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

This claim is evidenced by the following facts:

1. All other allegations in this petition are incorporated into this claim by specific reference.
2. Potential juror Ronald L. White expressed reservations about imposing the death penalty, but his reservations were, at best, equivocal. On questioning by Petitioner's counsel, Mr. White stated that it was possible he would vote for the death penalty under certain circumstances. (T. 466). After further questioning by the State and the Court, the State moved to excuse Juror White based on his alleged opposition to the death penalty. (T. 469). Petitioner's counsel objected not only to the disqualification of Mr. White, but to the trial court's entire procedure for conducting voir dire on this crucial issue:

MR. LEIPOLD: First, I have a motion in the form of an objection, which is to the Court, again, questioning the man. I think that at some point, and I think we have passed the line of neutrality when it comes to questioning of these potential jurors. The Court, in effect, is rehabilitating these jurors for the

state with its questions. The appropriate way for it to be done is for the Court to ask the question and counsel examine the jurors as to the responses they gave. For you to ask initial questions, for me to then get up and then effectively rehabilitate, for the District Attorney to get up, and for the Court to do it last again, with the authority and the power that you cloak, and by placing the emphasis on it, I think it is improper and I object to you handling it in that manner, again questioning the juror, repeatedly questioning and eliciting answers that are different from my questions [sic], to the very same questions. I think this juror's answers are totally ambivalent to his feelings on the death penalty, and I think it is clear that he should not be excused on the basis of any standards concerning *Witherspoon*.

(T. 469-70). The trial court granted the State's motion to excuse Mr. White for cause, (T. 471), despite Mr. White's assurance that he could consider the death penalty under certain circumstances.

3. Potential juror Virginia L. Nichols stated that it would be "difficult" for her to impose the death penalty. Ms. Nichols did not say that she could never impose the death penalty, and did not say that her hesitations about the death penalty would prevent or substantially impair her ability to follow the law and consider fairly the imposition of the death penalty. The State moved to excuse Ms. Nichols based on her purported opposition to the death penalty. (T. 132). Over defense objection, the trial court excused Ms. Nichols. (T. 133-34).

4. These actions by the trial judge violated Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

## CLAIM XVIII.

THE TRIAL COURT REFUSED TO EXCUSE FOR CAUSE POTENTIAL JURORS WHO STATED DURING VOIR DIRE THAT THEY WOULD AUTOMATICALLY IMPOSE THE DEATH PENALTY UPON A FINDING THAT PETITIONER WAS GUILTY OF THE CRIMES WITH WHICH HE WAS CHARGED, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

This claim is evidenced by the following facts:

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. Potential juror Robert Emory Reese stated unequivocally during voir dire that if he were to find Petitioner guilty of murder, he would automatically impose death.

MR. REESE: I think [the death penalty] is appropriate in some cases.

MR. LEIPOLD: Can you give me an idea of the kind of cases?

MR. REESE: I guess premeditated murder, which is, one of the stipulations in the law of Georgia.

MR. LEIPOLD: *Do you think that anyone who commits a premeditated murder should receive the death penalty if they are convicted of that crime beyond a reasonable doubt?*

MR. REESE: *I suppose so, at this point.*

MR. LEIPOLD: You suppose so?

MR. REESE: *Yes.*

(T. 104-05). Petitioner's counsel moved to exclude Mr. Reese for cause. (T. 107). The trial court denied the motion. (T. 110).

3. Potential juror Alex M. Wrigley similarly indicated during voir dire his belief that the only appropriate punishment for the taking of human life was the death penalty. (T. 137). A defense motion to strike Mr. Wrigley for cause was denied. (T. 138-39).

4. Potential juror Scott Daniel Walker was committed to voting for the death penalty if he found Petitioner guilty of the three murders with which Petitioner was charged.

MR. LEIPOLD: *In a real case with real people, if you determine to your satisfaction that a person has taken three human lives, could you think of any situation where you would not favor the death penalty?*

MR. WALKER: *No.*

(T. 210). A defense motion to exclude Mr. Walker for cause was denied. (T. 213-15).

5. Potential juror Eleanor C. Martin, when asked whether she could conceive of any situation involving the deliberate taking of a human life in which she would not favor imposition of the death penalty, responded that she would have to say "No." (T. 241). The trial court denied a defense motion to strike Ms. Martin for cause. (T. 243, 245).

6. These actions by the trial judge violated Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

## CLAIM XIX.

DETECTIVE CHARLES E. BUIS INJECTED HEARSAY EVIDENCE OF PETITIONER'S BAD CHARACTER, EXTRANEOUS CRIMINAL ACTIVITY BY PETITIONER, AND AN UNADJUDICATED CRIMINAL OFFENSE OF PETITIONER'S CAPITAL TRIAL, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

This claim is evidence by the following facts:



1. All other allegations in this petition are incorporated into this claim by specific reference.

2. The crimes for which Petitioner was tried occurred in DeKalb County, Georgia on October 13, 1986. A week later, Petitioner was arrested in Mission, Texas.

3. Detective Charles E. Buis testified for the State at Petitioner's trial. As part of his testimony, Detective Buis explained how the police knew to look for Petitioner in Texas:

MR. RICHTER: How did you become aware that the defendant might possibly be located in Mission, Texas?

MR. BUIS: *One of our detectives had received information that the defendant had possibly gone to Mission, Texas, to stay with someone that he knew that we were informed was a local drug dealer in Mission, by the name of Alex, and I believe later the last name Cavazos came up.*

(T. 1028). The detective who allegedly received the information did not testify, depriving Petitioner of any meaningful opportunity for cross-examination on the statement that he was staying with a "local drug dealer" in Texas.

4. Detective Buis' testimony placed Petitioner's character in issue, mentioned extraneous criminal activity not probative of any issue in Petitioner's case, and injected evidence of a crime for which Petitioner had been neither indicted nor convicted into Petitioner's trial.

5. Petitioner's trial counsel immediately objected to Detective Buis' testimony, and asked for a mistrial based on the hearsay testimony impugning Petitioner's character. Like defense counsel, the trial court was appalled by Detective Buis' testimony:

I can't believe you did that. This is the second or third time your testimony—first of all you start off

by characterizing the tape, giving your interpretation, and then make a statement like that. I don't understand that.

(T. 1030). However, the trial court refused to declare a mistrial. Instead, the court gave the jury a cautionary instruction:

THE COURT: Ladies and Gentlemen of the jury, this witness made a remark—I forget the person's name—whoever the person was in Texas, he had made some characterization of that person as a possible—of possibly he had some information this person might be involved in some sort of activity down in Texas—the other person who was driving the car at the time. I believe you have heard some testimony about that person. And this witness made some comment about that person's possible activities in some sort of illegal participation. That was completely irrelevant and has absolutely nothing to do with this trial. I have already instructed the witness that I will get on his case real bad if he does it again. But it really has nothing to do with this trial and I will ask you to disregard any kind of remark that he made about that. Okay? It has nothing to do with this trial whatsoever.

(T. 1033). The trial court's attempted curative instruction was inadequate, both because (a) the damage done to Petitioner in the eyes of the jury was irreparable, and (b) the instruction never once informed the jury that any inference about Petitioner's character, and other illegal acts and unadjudicated crimes, arising from Detective Buis' testimony should play no role in their decision; the jury was simply told that information about another person's allegedly illegal behavior was irrelevant in Petitioner's trial.

## CLAIM XX.

**DURING THE JURY DELIBERATIONS AT THE SENTENCING PHASE OF PETITIONER'S TRIAL, THE ALTERNATE JURORS WERE PERMITTED TO DELIBERATE IN THE JURY ROOM WITH THE JURY, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS**

This claim is evidenced by the following facts:

1. All other allegations in this petition are incorporated into this claim by specific reference.
2. While the jury in Petitioner's case was deciding whether Petitioner should live or die, the alternate jurors were in the jury room participating in the deliberations. Upon learning of this, Petitioner's trial counsel immediately objected and moved for a mistrial.

MR LEIPOLD: [I]t has come to my attention apparently the alternates have continued to be in the jury room with the jurors during the morning period of time. It is my contention that at the conclusion of the [guilt phase] deliberations in this case the alternates could, at that point, have absolutely nothing to do with this case, under any circumstances whatsoever. I think that it was an error to allow them to maintain themselves here, and I think that it was definite error to allow them to go into the jury room this morning.

My motion is for a mistrial on the ground this jury has been—that the alternates have been allowed to mingle with this jury and they have been approximately on hour this morning in the jury room with the 12 members of the jury. But, by law, they must have been excused at an earlier time, and it was an error to allow them to be in the jury room.

(T. 1427-28). The trial court refused to declare a mistrial. (T. 1428-29). Later that same day, Petitioner's trial counsel renewed his motion for a mistrial based on the alternate jurors' participation in the jury's penalty phase deliberations. The renewed motion was similarly denied. (T. 1433-34).

## CLAIM XXI.

**PETITIONER'S CAPITAL SENTENCING JURY WAS PERMITTED TO CONSIDER ONE UNDERLYING FACT AS THE BASIS FOR TWO SEPARATE AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF PETITIONER'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS**

This claim is evidenced by the following facts:

1. All other allegations in this petition are incorporated into this claim by specific reference.
2. The trial court instructed the sentencing jury in Petitioner's case that they could find two statutory aggravating circumstances: (1) that the murder was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," (T. 1438, *see* O.C.G.A. § 17-10-30 (b)(7)); and (2) that the murder was "committed while the defendant was engaged in the commission of another capital felony or aggravated battery." (T. 1437, *see* O.C.G.A. § 17-10-30 (b)(2)). The trial court had earlier improperly charged the jury during the guilt phase of Petitioner's trial with aggravated assault as the underlying felony for felony murder. (T. 1296-97).
3. The two statutory aggravating circumstances were based on the same underlying fact: evidence of an aggravated battery to at least one, if not all three, of the murder victims. The use of the facts of aggravated battery for multiple purposes cannot be squared with double



jeopardy, due process, or the prohibition against a mandatory death penalty. The jurors were misled and confused, but the trial court did not clarify the jury charge.

#### CLAIM XXII.

IN CLOSING ARGUMENT, THE PROSECUTOR IMPROPERLY COMMENTED ON PETITIONER'S FAILURE TO BE PRESENT IN THE COURTROOM DURING HIS TRIAL AND EXPRESSED HIS PERSONAL OPINION OF PETITIONER'S GUILTY, IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

This claim is evidenced by the following facts:

1. All other allegations in this petition are incorporated into this claim by specific reference.
2. In his closing argument, the prosecutor commented upon Petitioner's absence from the courtroom, by remarking on the jurors' opportunity to observe Petitioner's demeanor and expression during the "time you have seen Mr. Lonchar here." (T. 1255). The prosecutor also expressed his personal opinion by telling the jury that the state had placed the burden on their shoulders and there was "only one right thing to do"—to hold Petitioner responsible for the deaths that had occurred. (T. 1259).

#### CLAIM XXIII.

THE TRIAL COURT ERRED IN ITS RESPONSE TO A JURY QUESTION ABOUT THEIR INABILITY TO REACH A VERDICT AT THE PENALTY PHASE OF PETITIONER'S TRIAL, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

This claim is evidenced by the following facts:

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. After approximately five hours of penalty phase deliberations, Petitioner's sentencing jury sent a written request to the trial court asking for further instruction should they be unable to reach a unanimous decision. The trial court responded by instructing the jury as follows:

THE COURT: At some point, obviously, if you cannot reach a unanimous decision, you can report that fact to me. But I don't mind telling you the Court doesn't think you have been deliberating long enough yet to be able to make that decision. Certainly, the Court is not at this point prepared to accept a decision and, obviously, a difficult case, as all cases that are required—the Court would just ask you to continue your deliberation.

(T. 1469).

3. Petitioner's trial counsel immediately objected to the court's response, and moved for a mistrial.

MR. LEIPOLD: For the record, I will strongly object to you making any such statement to them, that they couldn't disperse until they reach a decision. I don't think that is appropriate. I think that is coercive at this point in time. I think they can indicate to you they cannot reach a decision and the appropriate action that you should take at that time—the jury has been out five hours already, and I don't think that is an appropriate thing for you to tell them.

I believe the Court's instruction that you gave the jury is telling them they are going to be here for the rest of the night if they don't make a decision, and I move for a mistrial on the penalty phase at this point.

(T. 1471-73). The trial court denied Petitioner's motion for a mistrial, (T. 1473), and did not reinstruct the jury on this issue.

4. The trial court's initial instructions to the jury prior to penalty phase deliberations made only brief mention that their penalty phase decision must be unanimous. (T. 1446). The court never instructed the jurors at the penalty phase—as the court had at the guilt phase—that they should not surrender an honest opinion to be congenial or to reach a verdict, solely because of the opinions of the other jurors. This omission, combined with the trial court's subsequent instruction that after five hours of deliberation the court would not accept a decision that the jury was deadlocked, created an unduly coercive situation violative of Petitioner's constitutional rights.

#### CLAIM XXIV.

THE TRIAL COURT INSTRUCTED THE JURY AT THE GUILT PHASE OF PETITIONER'S TRIAL ON CRIMINAL CONSPIRACY, ALTHOUGH PETITIONER HAD NOT BEEN INDICTED FOR CRIMINAL CONSPIRACY AND THE JURY HAD ALREADY BEEN CHARGED ON PARTIES TO A CRIME, IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

This claim is evidenced by the following facts:

1. All other allegations in this petition are incorporated into this claim by specific reference.
2. The trial court charged the jury at the guilt phase of Petitioner's trial on the Georgia law of parties to a crime. *See* O.C.G.A. § 16-2-20. The trial court then went on to charge the jury on the law of conspiracy (T.

1298-99; *see* O.C.G.A. § 16-4-8), although Petitioner had not been indicted for criminal conspiracy.

3. The charge on parties to a crime would have properly covered any alleged involvement of a co-defendant in the crimes with which Petitioner was charged. The additional charge on criminal conspiracy was confusing,<sup>11</sup> improper, and unduly emphasized the nature of Petitioner's participation in the offenses.

#### CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE Petitioner requests that this Court order the following relief:

1. That a stay of execution issue.
2. Sufficient time to adequately prepare and present his post-conviction petition.
3. Permission to timely amend his petition to conform to the evidence adduced by his investigation.
4. Funds for the assistance of investigative and other expert assistance necessary for the preparation and presentation of his petition.
5. Funds to take the depositions of witnesses necessary to his case.
6. Funds to compel the attendance of witnesses, from within and without the State, necessary to his case.
7. An evidentiary hearing at which he may present evidence in support of his claims.
8. Relief from his unconstitutional conviction and/or sentence.

<sup>11</sup> The trial court itself expressed concern that the jury would be confused by the charge on criminal conspiracy. The court noted that jurors would not understand whether the charge referred to conspiracy in an "evidentiary" sense or to the "separate crime of conspiracy." (T. 1186-87). Despite these hesitations, the trial court charged the jury on criminal conspiracy. (T. 1298-99).



/s/ Michael Mears  
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[Certificate of Service Omitted in Printing]

## EXHIBIT A

COUNTY OF DOUGLAS    )  
                                   )  
 STATE OF GEORGIA    )

## AFFIDAVIT OF DENNIS HERENDEEN, PH.D.

Comes now, DENNIS HERENDEEN, Ph.D., and before the undersigned official duly authorized to administer oaths, swears and states as follows:

1. I, Dennis Herendeen, am over eighteen years of age. This affidavit is made upon my personal knowledge, and I am competent to testify to the matters set forth herein.

2. I am a psychologist licensed to practice in the State of Georgia. Currently, I am the Clinical Director at The Psychology Center located in Douglasville, Georgia and have been so employed since 1985.

3. I began my career as a Clinical Psychologist at Georgia Regional Hospital in Atlanta, in 1973, and continued in that position until 1978. I received my Ph.D. in Experimental Psychology from Emory University in 1972; my M.S. in Psychology from Brigham Young University in 1968; and my B.S. in Psychology from Brigham Young University in 1966.

4. I have been asked to express my professional opinion as to Mr. Larry Lonchar's current mental condition, and whether he should be evaluated for competency to waive habeas corpus review of his convictions and sentences of death. I understand the relevant legal issue to be that set forth in *Rees v. Peyton*, 384 U.S. 312, 316 (1966):

to determine [Mr. Lonchar's] mental competence in the present posture of things, that is, whether he has the capacity to appreciate his position and make a rational choice with respect to continuing or aban-

doing further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

5. Since January 1994, I have met with Larry Lonchar on nine occasions under confidential conditions at the Georgia Diagnostic and Classification Center in Jackson, Georgia. On each occasion, Mr. Lonchar and I have met for at least one to two hours. I have not conducted a formal psychological evaluation of Mr. Lonchar; at Mr. Lonchar's request, our relationship up to this point has involved only psychotherapy and counseling. Nonetheless, based upon my extensive contact with him over the past year and a half and my confidential discussions with counsel, it is my opinion that Mr. Lonchar is not currently competent to waive his appeals. A formal psychological evaluation is necessary to determine whether Mr. Lonchar is, in fact, incompetent to waive his appeals.

6. It is my understanding that Mr. Lonchar has been previously evaluated for competency to waive appeals by three psychiatrists: Dr. Robert T.M. Phillips, who evaluated Mr. Lonchar on one occasion in March 1990, and on another occasion in September 1991; Dr. Everett Kuglar, who evaluated Mr. Lonchar on two occasions in March 1990; and Dr. Dave M. Davis, who evaluated Mr. Lonchar on one occasion in October 1991. I have reviewed the reports and testimony regarding these evaluations. Dr. Phillips diagnosed Mr. Lonchar as having bipolar disorder, and opined that Mr. Lonchar was not competent to waive his appeals. Dr. Kuglar and Dr. Davis concluded that Mr. Lonchar suffered from chronic mild depression and a personality disorder with anti-social and self-defeating traits, and that he was competent to waive his appeals.

7. Based upon my training and experience as a licensed psychologist, my review of the previous evaluations, my confidential discussions with counsel, and my

own experience with Larry Lonchar, it is my opinion, to a reasonable degree of psychological certainty: 1) that the previous evaluations of Mr. Lonchar's competency cannot be relied upon as an accurate assessment of Mr. Lonchar's current competency to waive habeas review; and 2) that Mr. Lonchar is currently incompetent to waive habeas review, and that his decision is not a voluntary one. A thorough psychological evaluation is necessary for me to determine whether Mr. Lonchar is, in fact, competent to make the decision to waive habeas review, and whether that decision is voluntary.

8. The insufficiency of the previous competency evaluations for the determination of Mr. Lonchar's current mental condition should be obvious. There are two main areas of concern here: First, none of Mr. Lonchar's prior evaluations made any significant exploration of Mr. Lonchar's long history of self-mutilation. This type of self-destructive behavior goes right to the heart of the question of whether or not Mr. Lonchar is fully capable of making rational choices concerning his appeals. During the course of my visits with him, there was never a time in which Mr. Lonchar did not have open wounds on his arms and body. These wounds are a result of Mr. Lonchar picking at his skin until it became a sore. This plain evidence of self-mutilation was not reported by previous evaluators.

9. Second, the duration of time since Mr. Lonchar's last evaluation—over three and one-half years, an eternity in psychological terms—would render those evaluations inadequate for the contemporary assessment of virtually any psychological condition. This is especially true for the highly volatile condition which must be assessed here, *i.e.*, Mr. Lonchar's capacity "in the present posture of things" to appreciate his position and make a rational choice with respect to his appeals, or whether he is *currently* suffering from a mental disease, disorder, or defect which may substantially affect his capacity to appreciate



his position and make a rational choice with respect to his appeals. While an assessment of Mr. Lonchar capacity over three years ago is a relevant piece of information which must be considered in formulating an opinion as to Mr. Lonchar's current condition, the issues cannot be resolved in a professional manner without a thorough contemporary evaluation.

10. The need for a current evaluation is particularly acute where, as here, several significant events have occurred since the last evaluation which cast doubt upon Mr. Lonchar's mental capacity. The most obviously significant event since Mr. Lonchar's last evaluation occurred in February 1993, when he signed papers just thirty minutes before the time scheduled for his execution, authorizing his attorneys to seek a stay of execution and pursue a habeas petition on his behalf. In view of Mr. Lonchar's previous persistent refusal to file a habeas corpus petition and his prior efforts to avoid his direct appeal, this radical change of course is of obvious clinical significance.

11. Moreover, immediately after signing papers to authorize his appeals, Mr. Lonchar's mental condition took a precipitous decline. In response to his bizarre behavior the prison placed Mr. Lonchar on a special suicide watch which continued for several weeks.

12. Mr. Lonchar's mental condition deteriorated even further in the ensuing months. In May, 1993, Mr. Lonchar attempted suicide by slashing his wrist with a sharp object. When prison officers blocked the suicide attempt, Mr. Lonchar's depression deepened. The psychological processes which led to Mr. Lonchar taking this drastic and irrational action must be thoroughly evaluated, and a professional assessment of Mr. Lonchar's current mental capacity must consider this event.

13. Subsequent to this direct suicide attempt, Mr. Lonchar once again expressed a desire to forego his

habeas corpus appeals and be executed. Mr. Lonchar's testimony at the June 23, 1994 hearing in which he stated his desire to dismiss his petition raises clear questions about whether he has the current mental capacity to make a rational choice concerning his appeals, and whether that decision is a voluntary one in light of the factors which motivate his current desire to waive his appeals.

14. In addition, during the course of my relationship with Mr. Lonchar, he has revealed information that undermines the diagnoses of the state's experts. Mr. Lonchar has concealed his history of manic episodes from those evaluators, which deprived them of the information essential to a proper diagnosis. Mr. Lonchar has said that he lied to the state experts when they asked him whether he had ever had manic phases, and that he couldn't believe that they did not evaluate him on a context and environment in which his manic episodes would have been revealed to them. As a result, the conclusion of the state evaluators that bipolar disorder could be ruled out—predicated as it was on the absence of manic episodes—can no longer be credited. The manic episodes experienced by Mr. Lonchar are completely consistent with the diagnosis of bipolar disorder rendered by Dr. Phillips. The revelation, contrary to the findings of the state experts, that he has suffered from manic episodes is further evidence of his self-defeating personality traits, since he knows that the disclosure of this information "makes the case" that he is incompetent.

15. Based upon the sum of my experience with Mr. Lonchar and my review of materials concerning his case, it is my opinion that Mr. Lonchar is currently incompetent to waive his habeas corpus appeals, and that his decision is not voluntary. It is imperative that Mr. Lonchar receive a thorough psychological evaluation for competency and the voluntariness of his decision not to appeal his convictions and sentences of death. The prior evalua-

tions of Mr. Lonchar's competency cannot be relied upon to establish his current competency, in light of the extended period of time since those evaluations were conducted, the many psychologically significant events which have occurred since that time, and the manifestly incorrect finding of the state experts that Mr. Lonchar had never suffered from manic episodes.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Dennis Herendeen, Ph.D.  
DENNIS HERENDEEN, Ph.D.  
Licensed Psychologist, Ga. #444

[Notary Omitted in Printing]

EXHIBIT B

COUNTY OF DOUGLAS     )  
                                      )  
STATE OF GEORGIA        )

SUPPLEMENTAL AFFIDAVIT OF  
DENNIS HERENDEEN, PH.D.

Comes now, DENNIS HERENDEEN, Ph.D., and before the undersigned official duly authorized to administer oaths, swears and states as follows:

1. I, Dennis Herendeen, am over eighteen years of age. This affidavit is made upon my personal knowledge, and I am competent to testify to the matters set forth herein.

2. I have been asked to clarify my earlier affidavit regarding Larry Lonchar. As I stated, I have not conducted a formal evaluation of Mr. Lonchar for his competency to waive his appeals. I have visited with Mr. Lonchar on nine occasions over the past year and a half, and we have developed a strong therapeutic relationship. At Mr. Lonchar's request, our relationship to this point has been limited to therapy and counselling, and has not involved a formal psychological evaluation. I have confidently and appropriately stated my opinion with respect to Mr. Lonchar's competency based upon the information available to me and the ongoing therapeutic relationship I have developed with Mr. Lonchar. Clinical practice dictates, however, that it is most appropriate for me to conduct a formal psychological evaluation, to provide me an opportunity to directly interact with Mr. Lonchar with the understanding that I am evaluating him for the issue of competency to waive his appeals. Mr. Lonchar has expressed a desire for me to conduct a formal evaluation, and I believe it is imperative that I do so.

FURTHER AFFIANT SAYETH NAUGHT.



/s/ Dennis Herendeen, Ph.D.  
 DENNIS HERENDEEN, Ph.D.  
 Licensed Psychologist, Ga. #444

[Notary Omitted in Printing]

## EXHIBIT C

COUNTY OF FULTON     )  
                                   )  
 STATE OF GEORGIA     )

## AFFIDAVIT OF DAVE M. DAVIS, M.D.

Comes now, before the undersigned official duly authorized to administer oaths, Dave M. Davis, M.D., who swears and states as follows:

1. I, Dave M. Davis, am over eighteen years of age. This affidavit is made upon my personal knowledge, and I am competent to testify to the matters set forth herein.

2. I am a medical doctor licensed in the state of Georgia, with a private practice in psychiatry located at 1938 Peachtree Road NW, Atlanta, Georgia 30309. I received my undergraduate degree from the University of North Carolina at Chapel Hill in 1959. In 1963, I received my M.D. from the Medical School of the University of North Carolina at Chapel Hill. I spent a year of residency in internal medicine at the University of Florida, followed by a year of residency in psychiatry at Harvard University and two years in the United States Army as a psychiatrist. From 1967 to 1969, I was a resident psychiatrist at Emory University. I am board certified in clinical psychiatry, administrative psychiatry, and forensic psychiatry. I am currently licensed to practice in Georgia, Massachusetts, and North Carolina. I have been qualified as an expert witness in psychiatry in numerous state and federal courts. In November 1991, I testified as an expert on the issue of Mr. Larry Lonchar's competency to waive his appeals at a hearing before the United States District Court for the Northern District of Georgia, Judge Jack T. Camp presiding.

3. In October 1991, I evaluated Mr. Larry Lonchar at the Georgia Diagnostic and Classification Center in

Jackson, Georgia. I was asked to assess whether Mr. Lonchar was competent to waive his appeals, under the following standard set forth by the United States Supreme Court in *Rees v. Peyton*, 384 U.S. 312, 316 (1966):

whether [Mr. Lonchar] has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

4. At the hearing before the District Court, I expressed my professional opinion that, at that time Mr. Lonchar was competent to make the decision whether to pursue or forego habeas corpus appeals challenging his convictions and death sentences.

5. I have been informed that in February 1993, thirty minutes before the time scheduled for his execution, Mr. Lonchar signed papers authorizing his attorneys to seek a stay of execution and pursue a habeas petition on his behalf. I have been told that in May 1993, Mr. Lonchar attempted suicide at the prison in Jackson. I have also been informed that Mr. Lonchar has once again expressed his desire to forego his habeas corpus appeals and be executed by the State of Georgia.

6. It is my professional opinion that my previous evaluation of Mr. Lonchar's competency cannot be relied upon as a valid assessment of his current competency to waive his appeals, and that a new evaluation is warranted. It has been over three years since I last evaluated Mr. Lonchar. Under the prevailing professional standards of practice with respect to forensic psychiatric evaluations, the extended period of time since my last evaluation of Mr. Lonchar undermines confidence in its accuracy as an indicator of Mr. Lonchar's current mental status. In addition, intervening events in this case which bear on the issue of Mr. Lonchar's competency—including Mr.

Lonchar's apparent change of heart on the eve of his execution, his subsequent suicide attempt, and his apparent renewed desire to forego his appeals and be executed—require a thorough psychiatric evaluation to establish whether Mr. Lonchar is currently competent to waive his appeals.

Further affiant sayeth not.

/s/ Dave M. Davis, M.D.  
DAVE M. DAVIS, M.D.

[Notary Omitted in Printing]



## EXHIBIT D

STATE OF GEORGIA     )  
                                   )  
 COUNTY OF BUTTS     )

Comes Now Larry Grant Lonchar, before the undersigned official duly authorized to administer oaths, and swears and states as follows:

1. I have no objection to being evaluated by Dr. Dennis Herendeen with respect to my competency to waive appeals of my convictions and death sentences.

/s/ Larry G. Lonchar  
 LARRY GRANT LONCHAR

[Notary Omitted in Printing]

IN THE SUPERIOR COURT OF BUTTS COUNTY  
 STATE OF GEORGIA

\_\_\_\_\_  
 [Title Omitted in Printing]  
 \_\_\_\_\_

**MOTION FOR ORDER PERMITTING  
 PSYCHOLOGICAL EVALUATION**

Comes Now Petitioner Milan Lonchar, Jr., as next-friend to Larry Lonchar, and requests that this Court order the Georgia Diagnostic and Classification Center to permit Dr. Dennis Herendeen access to the prison to evaluate Larry Lonchar, pursuant to the conditions outlined in the attached proposed order. In support of this motion, Petitioner shows as follows:

Simultaneous with the filing of this motion, Petitioner is filing a habeas corpus action on behalf of his brother, Larry Lonchar, who is scheduled to be executed on Friday, June 23, 1995 at 3:00 p.m. In the petition and in this motion, Petitioner alleges that Larry Lonchar is incompetent to waive his right to seek habeas corpus relief from his convictions and death sentences, and that Petitioner should be permitted to pursue a habeas petition in his stead. *See, e.g., Whitmore v. Arkansas*, 495 U.S. 149, 110 S.Ct. 1717 (1990); *Kellogg v. Zant*, 260 Ga. 182, 390 S.E.2d 839 (1990).

A psychological evaluation of Mr. Lonchar is necessary to determine whether he is, in fact, incompetent to waive his appeals. The Georgia Diagnostic and Classification Center will not permit a psychologist to evaluate Mr. Lonchar without an Order from this Court permitting such evaluation. As set forth below, substantial grounds exist to warrant an evaluation of Mr. Lonchar's competency to waive his appeals, and this Court should forthwith issue an order to allow Dr. Dennis Herendeen to conduct such an evaluation.

Mr. Lonchar, the State Expert Who Last Evaluated Mr. Lonchar, and a Psychologist Who Has Counseled Mr. Lonchar Extensively Over The Past Two Years All Agree that Mr. Lonchar Must Be Evaluated for Competency.

Mr. Lonchar was last evaluated for competency in October 1991, prior to a federal evidentiary hearing on the issue.<sup>1</sup> Every interested party in this case—with the exception of the Attorney General—has agreed that Mr. Lonchar's current mental condition should be evaluated to determine whether he is competent to waive his appeals and proceed to the electric chair. Mr. Clive Stafford Smith (counsel on Mr. Lonchar's habeas petition and his federal lawsuit to prohibit electrocution) and Mr. John Matteson (retained counsel for Mr. Lonchar) have repeatedly attempt to secure access for such an evaluation, but they have been blocked at every turn by the Attorney General's office, counsel for Respondent and the prison.

Mr. Lonchar himself has agreed to be evaluated by Dr. Herendeen. See Exhibit A (affidavit of Larry Lonchar).

The State's expert who conducted the October 1991 evaluation has frankly acknowledged in a sworn affidavit that his evaluation cannot be relied upon as a basis for finding Mr. Lonchar competent at the present time, and that a new evaluation is needed in light of developments which cast doubt upon Mr. Lonchar's competency:

It is my professional opinion that my previous evaluation of Mr. Lonchar's competency cannot be relied

<sup>1</sup> The United States District Court Judge refused to defer to this Court's finding that Mr. Lonchar was competent to waive his appeals, concluding that, "[i]n the rush to execute Mr. Lonchar, the state court compromised the adequacy of the competency hearing." 8/15/91 District Court Order at 12. Of course, if that rushed hearing were inadequate to ensure reliability, the denial of even an opportunity to have Mr. Lonchar evaluated (with his own consent) would surely be accorded little respect and less deference from a federal court.

upon as a valid assessment of his current competency to waive his appeals, and that a new evaluation is warranted. It has been over three years since I last evaluated Mr. Lonchar. Under the prevailing professional standards of practice with respect to forensic psychiatric evaluations, the extended period of time since my last evaluation of Mr. Lonchar undermines confidence in its accuracy as an indicator of Mr. Lonchar's current mental status. In addition, intervening events in this case which bear on the issue of Mr. Lonchar's competency—including Mr. Lonchar's apparent change of heart on the eve of his execution, his subsequent suicide attempt, and his apparent renewed desire to forego his appeals and be executed—require a thorough psychiatric evaluation to establish whether Mr. Lonchar is currently competent to waive his appeals.

Affidavit of Dave M. Davis, M.D. (attached hereto as Exhibit B).

Dr. Dennis Herendeen, a licensed psychologist, has been involved in extensive counselling and psychotherapy sessions with Mr. Lonchar over the past year and a half. In a sworn affidavit submitted with this motion, Dr. Herendeen has expressed his opinion that Mr. Lonchar is incompetent to waive his appeals, but that a formal evaluation for competency is necessary:

4. I have been asked to express my professional opinion as to Mr. Larry Lonchar's current mental condition, and whether he should be evaluated for competency to waive habeas corpus review of his convictions and sentences of death. I understand the relevant legal issue to be that set forth in *Rees v. Peyton*, 384 U.S. 312, 316 (1966):

to determine [Mr. Lonchar's] mental competence in the present posture of things, that is,



whether he has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

5. Since January 1994, I have met with Larry Lonchar on nine occasions under confidential conditions at the Georgia Diagnostic and Classification Center in Jackson, Georgia. On each occasion, Mr. Lonchar and I have met for at least one to two hours. I have not conducted a formal psychological evaluation of Mr. Lonchar; at Mr. Lonchar's request, our relationship up to this point has involved only psychotherapy and counseling. Nonetheless, based upon my extensive contact with him over the past year and a half and my confidential discussions with counsel, it is my opinion that Mr. Lonchar is not currently competent to waive his appeals. A formal psychological evaluation is necessary to determine whether Mr. Lonchar is, in fact, incompetent to waive his appeals.

6. It is my understanding that Mr. Lonchar has been previously evaluated for competency to waive appeals by three psychiatrists: Dr. Robert T.M. Phillips, who evaluated Mr. Lonchar on one occasion in March 1990, and on another occasion in September 1991; Dr. Everett Kuglar, who evaluated Mr. Lonchar on two occasions in March 1990; and Dr. Dave M. Davis, who evaluated Mr. Lonchar on one occasion in October 1991. I have reviewed the reports and testimony regarding these evaluations. Dr. Phillips diagnosed Mr. Lonchar as having bipolar disorder, and opined that Mr. Lonchar was not competent to waive his appeals. Dr. Kuglar and Dr. Davis concluded that Mr. Lonchar suffered from

chronic mild depression and a personality disorder with anti-social and self-defeating traits, and that he was competent to waive his appeals.

7. Based upon my training and experience as a licensed psychologist, my review of the previous evaluations, my confidential discussions with counsel, and my own experience with Larry Lonchar, it is my opinion, to a reasonable degree of psychological certainty: 1) that the previous evaluations of Mr. Lonchar's competency cannot be relied upon as an accurate assessment of Mr. Lonchar's current competency to waive habeas review; and 2) that Mr. Lonchar is currently incompetent to waive habeas review, and that his decision is not a voluntary one. A thorough psychological evaluation is necessary for me to determine whether Mr. Lonchar is, in fact, competent to make the decision to waive habeas review, and whether that decision is voluntary.

8. The insufficiency of the previous competency evaluations for the determination of Mr. Lonchar's current mental condition should be obvious. There are two main areas of concern here: First, none of Mr. Lonchar's prior evaluations made any significant exploration of Mr. Lonchar's long history of self-mutilation. This type of self-destructive behavior goes right to the heart of the question of whether or not Mr. Lonchar is fully capable of making rational choices concerning his appeals. During the course of my visits with him, there was never a time in which Mr. Lonchar did not have open wounds on his arms and body. These wounds are a result of Mr. Lonchar picking at his skin until it became a sore. This plain evidence of self-mutilation was not reported by previous evaluators.

9. Second, the duration of time since Mr. Lonchar's last evaluation—over three and one-half years, an eternity in psychological terms—would render those evaluations inadequate for the contemporary assessment of virtually any psychological condition. This is especially true for the highly volatile condition which must be assessed here, *i.e.*, Mr. Lonchar's capacity "in the present posture of things" to appreciate his position and make a rational choice with respect to this appeal, or whether he is *currently* suffering from a mental disease, disorder, or defect which may substantially affect his capacity to appreciate his position and make a rational choice with respect to his appeals. While an assessment of Mr. Lonchar capacity over three years ago is a relevant piece of information which must be considered in formulating an opinion as to Mr. Lonchar's current condition, the issues cannot be resolved in a professional manner without a thorough contemporary evaluation.

10. The need for a current evaluation is particularly acute where, as here, several significant events have occurred since the last evaluation which cast doubt upon Mr. Lonchar's mental capacity. The most obviously significant event since Mr. Lonchar's last evaluation occurred in February 1993, when he signed papers just thirty minutes before the time scheduled for his execution, authorizing his attorneys to seek a stay of execution and pursue a habeas petition on his behalf. In view of Mr. Lonchar's previous persistent refusal to file a habeas corpus petition and his prior efforts to avoid his direct appeal, this radical change of course is of obvious clinical significance.

11. Moreover, immediately after signing papers to authorize his appeals, Mr. Lonchar's mental condition took a precipitous decline. In response to his

bizarre behavior the prison placed Mr. Lonchar on a special suicide watch which continued for several weeks.

12. Mr. Lonchar's mental condition deteriorated even further in the ensuing months. In May, 1993, Mr. Lonchar attempted suicide by slashing his wrist with a sharp object. When prison officers blocked the suicide attempt, Mr. Lonchar's depression deepened. The psychological processes which led to Mr. Lonchar taking this drastic and irrational action must be thoroughly evaluated, and a professional assessment of Mr. Lonchar's current mental capacity must consider this event.

13. Subsequent to this direct suicide attempt, Mr. Lonchar once again expressed a desire to forego his habeas corpus appeals and be executed. Mr. Lonchar's testimony at the June 23, 1994 hearing in which he stated his desire to dismiss his petition raises clear questions about whether he has the current mental capacity to make a rational choice concerning his appeals, and whether that decision is a voluntary one in light of the factors which motivate his current desire to waive his appeals.

14. In addition, during the course of my relationship with Mr. Lonchar, he has revealed information that undermines the diagnoses of the state's experts. Mr. Lonchar has concealed his history of manic episodes from those evaluators, which deprived them of the information essential to a proper diagnosis. Mr. Lonchar has said that he lied to the state experts when they asked him whether he had ever had manic phases, and that he couldn't believe that they did not evaluate him in a context and environment in which his manic episodes would have been revealed to them. As a result, the conclusion of the state evaluators that bipolar disorder could be ruled



out—predicated as it was on the absence of manic episodes—can no longer be credited. The manic episodes experienced by Mr. Lonchar are completely consistent with the diagnosis of bipolar disorder rendered by Dr. Phillips. The revelation, contrary to the findings of the state experts, that he has suffered from manic episodes is further evidence of his self-defeating personality traits, since he knows that the disclosure of this information “makes the case” that he is incompetent.

15. Based upon the sum of my experience with Mr. Lonchar and my review of materials concerning his case, it is my opinion that Mr. Lonchar is currently incompetent to waive his habeas corpus appeals, and that his decision is not voluntary. It is imperative that Mr. Lonchar receive a thorough psychological evaluation for competency and the voluntariness of his decision not to appeal his convictions and sentences of death. The prior evaluations of Mr. Lonchar’s competency cannot be relied upon to establish his current competency, in light of the extended period of time since those evaluations were conducted, the many psychologically significant events which have occurred since that time, and the manifestly incorrect finding of the state experts that Mr. Lonchar had never suffered from manic episodes.

Affidavit of Dennis Herendeen, Ph.D. (attached hereto as Exhibit C).

In a supplemental affidavit, Dr. Herendeen has emphasized the clinical necessity of a formal psychological evaluation of whether Mr. Lonchar is competent to waive his appeals and proceed to the electric chair:

I have visited with Mr. Lonchar on nine occasions over the past year and a half, and we have developed a strong therapeutic relationship. At Mr. Lonchar’s

request, our relationship to this point has been limited to therapy and counselling, and has not involved a formal psychological evaluation. I have confidently and appropriately stated my opinion with respect to Mr. Lonchar’s competency based upon the information available to me and the ongoing therapeutic relationship I have developed with Mr. Lonchar. Clinical practice dictates, however, that it is most appropriate for me to conduct a formal psychological evaluation, to provide me an opportunity to directly interact with Mr. Lonchar with the understanding that I am evaluating him for the issue of competency to waive his appeals. Mr. Lonchar has expressed a desire for me to conduct a formal evaluation, and I believe it is imperative that I do so.

Supplemental Affidavit of Dennis Herendeen, Ph.D. (attached hereto as Exhibit D).

### CONCLUSION

Mr. Lonchar has agreed to be evaluated by Dr. Herendeen. Mr. Lonchar’s retained counsel and habeas counsel believe that he needs to be evaluated and have made every effort to secure such an evaluation. The most recent State expert to have evaluated Mr. Lonchar believes that his prior evaluation is no longer valid, and that a new evaluation should be conducted. The psychologist who has extensively counselled Mr. Lonchar over the past year and a half believes that Mr. Lonchar is incompetent, and that the prior diagnoses of the State’s experts were inaccurate.

Petitioner has alleged that Mr. Lonchar is incompetent and has supported those allegations with substantial evidence that Mr. Lonchar is incompetent. This Court should grant the motion and issue an order allowing Dr. Herendeen access to evaluate Mr. Lonchar’s current mental condition.

WHEREFORE, Petitioner prays that this court grant Dr. Dennis Herendeen access to Mr. Lonchar at the prison in order to conduct a psychological evaluation. A proposed Order is attached.

Respectfully submitted,

/s/ Michael Mears/by SOB  
 MICHAEL MEARS  
 Georgia Bar No. 500494  
 985 Ponce de Leon Avenue, N.E.  
 Atlanta, Georgia 30306  
 (404) 894-2595  
 Attorney for Milan Lonchar, Jr.

EXHIBIT A

STATE OF GEORGIA )  
 )  
 COUNTY OF BUTTS )

Comes Now Larry Grant Lonchar, before the undersigned official duly authorized to administer oaths, and swears and states as follows:

1. I have no objection to being evaluated by Dr. Dennis Herendeen with respect to my competency to waive appeals of my convictions and death sentences.

/s/ Larry Grant Lonchar  
 LARRY GRANT LONCHAR

[Notary Omitted in Printing]



## EXHIBIT B

COUNTY OF FULTON     )  
                                       )  
 STATE OF GEORGIA     )

## AFFIDAVIT OF DAVE M. DAVIS, M.D.

Comes now, before the undersigned official duly authorized to administer oaths, Dave M. Davis, M.D., who swears and states as follows:

1. I, Dave M. Davis, am over eighteen years of age. This affidavit is made upon my personal knowledge, and I am competent to testify to the matters set forth herein.

2. I am a medical doctor licensed in the state of Georgia, with a private practice in psychiatry located at 1938 Peachtree Road NW, Atlanta, Georgia 30309. I received my undergraduate degree from the University of North Carolina at Chapel Hill in 1959. In 1963, I received my M.D. from the Medical School of the University of North Carolina at Chapel Hill. I spent a year of residency in internal medicine at the University of Florida, followed by a year of residency in psychiatry at Harvard University and two years in the United States Army as a psychiatrist. From 1967 to 1969, I was a resident psychiatrist at Emory University. I am board certified in clinical psychiatry, administrative psychiatry, and forensic psychiatry. I am currently licensed to practice in Georgia, Massachusetts, and North Carolina. I have been qualified as an expert witness in psychiatry in numerous state and federal courts. In November 1991, I testified as an expert on the issue of Mr. Larry Lonchar's competency to waive his appeals at a hearing before the United States District Court for the Northern District of Georgia, Judge Jack T. Camp presiding.

3. In October 1991, I evaluated Mr. Larry Lonchar at the Georgia Diagnostic and Classification Center in

Jackson, Georgia. I was asked to assess whether Mr. Lonchar was competent to waive his appeals, under the following standard set forth by the United States Supreme Court in *Rees v. Peyton*, 384 U.S. 312, 316 (1966):

whether [Mr. Lonchar] has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

4. At the hearing before the District Court, I expressed my professional opinion that, at that time Mr. Lonchar was competent to make the decision whether to pursue or forego habeas corpus appeals challenging his convictions and death sentences.

5. I have been informed that in February 1993, thirty minutes before the time scheduled for his execution, Mr. Lonchar signed papers authorizing his attorneys to seek a stay of execution and pursue a habeas petition on his behalf. I have been told that in May 1993, Mr. Lonchar attempted suicide at the prison in Jackson. I have also been informed that Mr. Lonchar has once again expressed his desire to forego his habeas corpus appeals and be executed by the State of Georgia.

6. It is my professional opinion that my previous evaluation of Mr. Lonchar's competency cannot be relied upon as a valid assessment of his current competency to waive his appeals, and that a new evaluation is warranted. It has been over three years since I last evaluated Mr. Lonchar. Under the prevailing professional standards of practice with respect to forensic psychiatric evaluations, the extended period of time since my last evaluation of Mr. Lonchar undermines confidence in its accuracy as an indicator of Mr. Lonchar's current mental status. In addition, intervening events in this case which bear on the

issue of Mr. Lonchar's competency—including Mr. Lonchar's apparent change of heart on the eve of his execution, his subsequent suicide attempt, and his apparent renewed desire to forego his appeals and be executed—require a thorough psychiatric evaluation to establish whether Mr. Lonchar is currently competent to waive his appeals.

Further affiant sayeth not.

/s/ Dave M. Davis, M.D.  
DAVE M. DAVIS, M.D.

[Notary Omitted in Printing]

# EXHIBIT C

COUNTY OF DOUGLAS   )  
                                  )  
STATE OF GEORGIA    )

## AFFIDAVIT OF DENNIS HERENDEEN, PH.D.

Comes now, DENNIS HERENDEEN, Ph.D., and before the undersigned official duly authorized to administer oaths, swears and states as follows:

1. I, Dennis Herenden, am over eighteen years of age. This affidavit is made upon my personal knowledge, and I am competent to testify to the matters set forth herein.

2. I am a psychologist licensed to practice in the State of Georgia. Currently, I am the Clinical Director at The Psychology Center located in Douglasville, Georgia and have been so employed since 1985.

3. I began my career as a Clinical Psychologist at Georgia Regional Hospital in Atlanta, in 1973, and continued in that position until 1978. I received my Ph.D. in Experimental Psychology from Emory University in 1972; my M.S. in Psychology from Brigham Young University in 1968; and my B.S. in Psychology from Brigham Young University in 1966.

4. I have been asked to express my professional opinion as to Mr. Larry Lonchar's current mental condition, and whether he should be evaluated for competency to waive habeas corpus review of his convictions and sentences of death. I understand the relevant legal issue to be that set forth in *Rees v. Peyton*, 384 U.S. 312, 316 (1966):

to determine [Mr. Lonchar's] mental competence in the present posture of things, that is, whether he has the capacity to appreciate his position and make a



rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

5. Since January 1994, I have met with Larry Lonchar on nine occasions under confidential conditions at the Georgia Diagnostic and Classification Center in Jackson, Georgia. On each occasion, Mr. Lonchar and I have met for at least one to two hours. I have not conducted a formal psychological evaluation of Mr. Lonchar; at Mr. Lonchar's request, our relationship up to this point has involved only psychotherapy and counseling. Nonetheless, based upon my extensive contact with him over the past year and a half and my confidential discussions with counsel, it is my opinion that Mr. Lonchar is not currently competent to waive his appeals. A formal psychological evaluation is necessary to determine whether Mr. Lonchar is, in fact, incompetent to waive his appeals.

6. It is my understanding that Mr. Lonchar has been previously evaluated for competency to waive appeals by three psychiatrists: Dr. Robert T.M. Phillips, who evaluated Mr. Lonchar on one occasion in March 1990, and on another occasion in September 1991; Dr. Everett Kuglar, who evaluated Mr. Lonchar on two occasions in March 1990; and Dr. Dave M. Davis, who evaluated Mr. Lonchar on one occasion in October 1991. I have reviewed the reports and testimony regarding these evaluations. Dr. Phillips diagnosed Mr. Lonchar as having bipolar disorder, and opined that Mr. Lonchar was not competent to waive his appeals. Dr. Kuglar and Dr. Davis concluded that Mr. Lonchar suffered from chronic mild depression and a personality disorder with anti-social and self-defeating traits, and that he was competent to waive his appeals.

7. Based upon my training and experience as a licensed psychologist, my review of the previous evaluations, my

confidential discussions with council, and my own experience with Larry Lonchar, it is my opinion, to a reasonable degree of psychological certainty: 1) that the previous evaluations of Mr. Lonchar's competency cannot be relied upon as an accurate assessment of Mr. Lonchar's current competency to waive habeas review; and 2) that Mr. Lonchar is currently incompetent to waive habeas review, and that his decision is not a voluntary one. A thorough psychological evaluation is necessary for me to determine whether Mr. Lonchar is, in fact, competent to make the decision to waive habeas review, and whether that decision is voluntary.

8. The insufficiency of the previous competency evaluations for the determination of Mr. Lonchar's current mental condition should be obvious. There are two main areas of concern here: First, none of Mr. Lonchar's prior evaluations made any significant exploration of Mr. Lonchar's long history of self-mutilation. This type of self-destructive behavior goes right to the heart of the question of whether or not Mr. Lonchar is fully capable of making rational choices concerning his appeals. During the course of my visits with him, there was never a time in which Mr. Lonchar did not have open wounds on his arms and body. These wounds are a result of Mr. Lonchar picking at his skin until it became a sore. This plain evidence of self-mutilation was not reported by previous evaluators.

9. Second, the duration of time since Mr. Lonchar's last evaluation—over three and one-half years, an eternity in psychological terms—would render those evaluation inadequate for the contemporary assessment of virtually any psychological condition. This is especially true for the highly volatile condition which must be assessed here, *i.e.*, Mr. Lonchar's capacity "in the present posture of things" to appreciate his position and make a rational choice with respect to his appeals, or whether he is *currently* suffering from a mental disease, disorder, or defect which may sub-

stantially affect his capacity to appreciate his position and make a rational choice with respect to his appeals. While an assessment of Mr. Lonchar capacity over three years ago is a relevant piece of information which must be considered in formulating an opinion as to Mr. Lonchar's current condition, the issues cannot be resolved in a professional manner without a thorough contemporary evaluation.

10. The need for a current evaluation is particularly acute where, as here, several significant events have occurred since the last evaluation which cast doubt upon Mr. Lonchar's mental capacity. The most obviously significant event since Mr. Lonchar's last evaluation occurred in February 1993, when he signed papers just thirty minutes before the time scheduled for his execution, authorizing his attorneys to seek a stay of execution and pursue a habeas petition on his behalf. In view of Mr. Lonchar's previous persistent refusal to file a habeas corpus petition and his prior efforts to avoid his direct appeal, this radical change of course is of obvious clinical significance.

11. Moreover, immediately after signing papers to authorize his appeals, Mr. Lonchar's mental condition took a precipitous decline. In response to his bizarre behavior the prison placed Mr. Lonchar on a special suicide watch which continued for several weeks.

12. Mr. Lonchar's mental condition deteriorated even further in the ensuing months. In May, 1993, Mr. Lonchar attempted suicide by slashing his wrist with a sharp object. When prison officers blocked the suicide attempt, Mr. Lonchar's depression deepened. The psychological processes which led to Mr. Lonchar taking this drastic and irrational action must be thoroughly evaluated, and a professional assessment of Mr. Lonchar's current mental capacity must consider this event.

13. Subsequent to this direct suicide attempt, Mr. Lonchar once again expressed a desire to forego his habeas

corpus appeals and be executed. Mr. Lonchar's testimony at the June 23, 1994 hearing in which he stated his desire to dismiss his petition raises clear questions about whether he has the current mental capacity to make a rational choice concerning his appeals, and whether that decision is a voluntary one in light of the factors which motivate his current desire to waive his appeals.

14. In addition, during the course of my relationship with Mr. Lonchar, he has revealed information that undermines the diagnoses of the state's experts. Mr. Lonchar has concealed his history of manic episodes from those evaluators, which deprived them of the information essential to a proper diagnosis. Mr. Lonchar has said that he lied to the state experts when they asked him whether he had ever had manic phases, and that he couldn't believe that they did not evaluate him in a context and environment in which his manic episodes would have been revealed to them. As a result, the conclusion of the state evaluators that bipolar disorder could be ruled out—predicated as it was on the absence of manic episodes—can no longer be credited. The manic episodes experienced by Mr. Lonchar are completely consistent with the diagnosis of bipolar disorder rendered by Dr. Phillips. The revelation, contrary to the findings of the state experts, that he has suffered from manic episodes is further evidence of his self-defeating personality traits, since he knows that the disclosure of this information "makes the case" that he is incompetent.

15. Based upon the sum of my experience with Mr. Lonchar and my review of materials concerning his case, it is my opinion that Mr. Lonchar is currently incompetent to waive his habeas corpus appeals, and that his decision is not voluntary. It is imperative that Mr. Lonchar receive a thorough psychological evaluation for competency and the voluntariness of his decision not to appeal his convictions and sentences of death. The prior evalua-



tions of Mr. Lonchar's competency cannot be relied upon to establish his current competency, in light of the extended period of time since those evaluations were conducted, the many psychologically significant events which have occurred since that time, and the manifestly incorrect finding of the state experts that Mr. Lonchar had never suffered from manic episodes.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Dennis Herendeen, Ph.D.  
DENNIS HERENDEEN, Ph.D.  
Licensed Psychologist  
Ga. # 444

[Notary Omitted in Printing]

EXHIBIT D

COUNTY OF DOUGLAS    )  
                                  )  
STATE OF GEORGIA     )

SUPPLEMENTAL AFFIDAVIT OF  
DENNIS HERENDEEN, PH.D.

Comes now, DENNIS HERENDEEN, Ph.D., and before the undersigned official duly authorized to administer oaths, swears and states as follows:

1. I, Dennis Herendeen, am over eighteen years of age. This affidavit is made upon my personal knowledge, and I am competent to testify to the matters set forth herein.

2. I have been asked to clarify my earlier affidavit regarding Larry Lonchar. As I stated, I have not conducted a formal evaluation of Mr. Lonchar for his competency to waive his appeals. I have visited with Mr. Lonchar on nine occasions over the past year and a half, and we have developed a strong therapeutic relationship. At Mr. Lonchar's request, our relationship to this point has been limited to therapy and counselling, and has not involved a formal psychological evaluation. I have confidently and appropriately stated my opinion with respect to Mr. Lonchar's competency based upon the information available to me and the ongoing therapeutic relationship I have developed with Mr. Lonchar. Clinical practice dictates, however, that it is most appropriate for me to conduct a formal psychological evaluation, to provide me an opportunity to directly interact with Mr. Lonchar with the understanding that I am evaluating him for the issue of competency to waive his appeals. Mr. Lonchar has expressed a desire for me to conduct a formal evaluation, and I believe it is imperative that I do so.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Dennis Herendeen, Ph.D.  
 DENNIS HERENDEEN, Ph.D.  
 Licensed Psychologist  
 Ga. # 444

[Notary Omitted in Printing]

[Certificate Omitted in Printing]

IN THE SUPERIOR COURT OF BUTTS COUNTY  
 STATE OF GEORGIA

[Title Omitted in Printing]

**ORDER**

Upon consideration of Petitioner Milan Lonchar, Jr.'s Motion for Order Permitting Psychological Evaluation, it is hereby

**ORDERED**, that the Respondent Albert G. Thomas, Warden of the Georgia Diagnostic and Classification Center (the "Center") admit into the Center Dennis Herendeen, Ph.D., for the purpose of conducting a psychological evaluation of Larry Grant Lonchar, and allow Dr. Herendeen to bring with him all necessary test materials to conduct that evaluations of Mr. Lonchar, and it is hereby,

**FURTHER ORDERED**, that Respondent permit Dr. Herendeen to conduct such evaluation and testing on Mr. Lonchar, subject to the following conditions:

(a) that Respondent be given at least 24 hours' notice of said evaluation and testing;

(b) that said evaluation and testing be conducted during the Center's normal visitation hours; and

\* \* \* \*



IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

---

No. 95-V1332

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LARRY GRANT LONCHAR,  
vs. *Petitioner,*

A.G. THOMAS, Warden,  
Georgia Diagnostic and Classification Center,  
*Respondent.*

---

**PETITION**

LARRY GRANT LONCHAR petitions this Court pursuant to O.C.G.A. §§ 9-14-41 *et seq.* and 28 U.S.C. 1983, Mr. Lonchar is an indigent person currently under sentence of death. Respondent is the Warden of the Georgia Diagnostic and Classification Center in Jackson, Georgia. The allegations of this petition are set forth as follows:

**I. HISTORY OF PRIOR PROCEEDINGS**

(1) The name and location of the court which entered the judgment of conviction and sentence under attack are:

Superior Court of DeKalb County  
Decatur, Georgia

(2) The date of the judgment of conviction was June 25, 1987. Petitioner was absent during his trial and during significant portions of his sentencing proceeding.

(3) The date of the judgment of sentence was June 27, 1987; the sentence was that Petitioner be put to death by electrocution for the crime of murder.

(4) The nature of the offense involved is that Petitioner was convicted of murder, in violation of O.C.G.A. § 16-5-1.

(5) At his trial, Petitioner pled not guilty.

(6) The trial on the issue of guilt or innocence and on the issue of sentence was had before a jury.

(7) Petitioner did not testify at the guilt/innocence trial. Petitioner did not testify at the penalty phase of the trial. In fact, Petitioner did not attend almost all of the proceedings.

(8) Petitioner's case was heard upon automatic appeal to the Georgia Supreme Court. The facts of Petitioner's appeal are as follows:

a. On July 13, 1988, the Supreme Court of Georgia affirmed Petitioner's conviction and sentence. *Lonchar v. State*, 258 Ga. 447, 369 S.E.2d 749 (1988). Rehearing was denied on July 31, 1988.

b. On January 9, 1989, the Supreme Court of the United States, with Justices Brennan and Marshall dissenting, denied a Petition for Writ of Certiorari filed on Petitioner's behalf. *Lonchar v. Georgia*, 109 S.Ct. 818 (1989). A timely-filed Petition for Rehearing was denied on February 27, 1989. *Lonchar v. Georgia*, 109 S.Ct. 1332 (1989).

(9) On March 8, 1990, the Superior Court of DeKalb County ordered that Petitioner's sentence of death be carried out between noon March 23, 1990, and noon on March 30, 1990.

(10) On March 14, 1990, the trial court refused to vacate his order, and transferred various questions to this Court for consideration. On March 20, 1990, the Supreme Court dismissed a motion to stay Petitioner's execution as premature, referring it also to this Court for consideration.

(11) On February 24, 1993, Petitioner filed a petition for a writ of habeas corpus with this Court. On January 25, 1995, this Court dismissed the proceeding without prejudice to it being filed again, entering the order proposed by the Attorney General. An application for a certificate of probable cause to appeal was denied on April 6, 1995. Rehearing was denied on May 4, 1995, and the remittitur was entered on May 5, 1995, vesting jurisdiction once again with this Court.

## II. FACTS OF THE OFFENSE

This case involves three deaths and at least two co-defendants. Both the judge and the prosecutor acknowledged, at various points during the co-defendants' proceedings, that it was at best unclear who did what. Mr. Lonchar was tried first and received death, essentially in absentia. The co-defendant, Mitch Wells, entered a plea in return for a life sentence two days after Petitioner was sentenced to death. Uncertainty about who was responsible for what at the crime scene was never resolved. (R. 6) (prosecutor speaking to judge); (R. 1231) (prosecutor closing argument); (R. 14) (plea of co-defendant Wells after Petitioner's death sentence, Judge speaking to prosecutor); (R. 50) (plea of co-defendant Wells, prosecutor speaking to Court). The only eyewitness at Petitioner's trial identified *three* perpetrators, and could not say that Petitioner shot anyone.

## III. CLAIMS FOR RELIEF

Each claim for relief raised below is predicated on the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as the Georgia Constitution and on other law set forth in the Petition.

## CLAIM I.

**NOT ONLY IS EXECUTION BY ELECTROCUTION CRUEL AND UNUSUAL PUNISHMENT, BUT LARRY LONCHAR OUGHT TO BE ALLOWED TO BE KILLED BY THE STATE IN SUCH A MANNER THAT HE MAY CONTRIBUTE HIS ORGANS TO PATIENTS IN NEED FOR THE BETTERMENT OF SOCIETY**

1. It is with sorrow that citizens often remark that the condemned inmate is unable to exchange places with the victim, forfeiting his life in exchange for restoring the victim's. Petitioner agrees. Being unable to do this, if executed Petitioner wishes to forfeit his organs to the State, thereby potentially saving the lives of up to ten seriously ill people who might otherwise die.

2. Petitioner has the right to humane and decent treatment, even in his execution. Under our own constitution, someone in Petitioner's position not only has the constitutional right to object where "cruel and unusual punishments [are] inflicted," but Petitioner also has the right not to "be abused . . . while . . . in prison." *Ga. Const. Art. 1, § 1, ¶ 17*.

3. In this case, if Petitioner is to be executed, he has a strong philosophical and moral desire to provide something back to society by donating his organs to science. As with every other human being in this State, Petitioner has "the natural and inalienable right to worship God, each according to the dictates of that person's own conscience." *Ga. Const. Art. 1, § 1, ¶ 3*

4. As discussed below, there is no reason to destroy Petitioner's ability to help society at the same time as he forfeits his life. Indeed, this is another violation of the Georgia Constitution, since "Government is instituted for the protection, security and benefit of the people." *Ga. Const. Art. 1, § 2, ¶ 2* (emphasis supplied). To destroy



Petitioner's ability to benefit society is, in this context, senseless, purposeless and unconstitutional.

5. The current method of execution in Georgia is electrocution. This would destroy any organ beyond any possible use. The second possibility for Petitioner's execution would be lethal injection. If Petitioner were actually killed by lethal injection, he could still provide his kidneys and liver if they were surgically removed immediately. However, it would not be medically possible to try to use the heart and lungs for transplant.

6. To maximize the availability of organs, Petitioner should be anaesthetized with Sodium Pentothal, which is a rapid anaesthesia that puts you out for about ten minutes. This is already used in most executions by lethal injection. This would be followed by a regular anaesthesia that would suffice to remove all the necessary organs. Again, this second anaesthetic is already used in most executions by lethal injection. Obviously, by the time the inmate has lost the heart and the lungs, he is dead anyway, and that is the end of it. There is no need to inject the poison that would normally be used to consummate the execution.

7. From the perspective of Society, there are many benefits to this procedure. First, it would cost less than electrocution. Second, it would eliminate the perception that death by electrocution is barbaric and does not provide Society with any tangible benefit. Third and most important, up to ten people's lives could be saved by the donation of the organs. There is currently a severe shortage of transplant organs available for many patients who are in desperate need.

8. The heart would automatically provide doctors with the chance to save one life, if the transplant worked. The two Lungs could each save another life. Likewise, the two kidneys are currently hard to come by for patients needing a transplant, and each could save a life. The

liver could be used for one person, or be split for two babies, thereby potentially saving another two lives.

9. There are also other organs that Petitioner would be able to donate to society which might also save a life, and would certainly provide doctors with an opportunity to alleviate the suffering of their patients. Examples would be the pancreas, the small intestine and the bone marrow.

10. In addition to providing a benefit for society, it would be possible for the State to realize a financial gain from the taking of Petitioner's organs. At the current state of organ shortage, this could provide a substantial sum that could go into a fund for the victim's survivors. Alternatively, the State could elect to use the funds to defray the cost of Petitioner's incarceration and execution.

11. Alternatively, Respondent THOMAS has expressed his intent to inflict the punishment of death upon Petitioner by use of electrocution pursuant to Georgia law. See *O.C.G.A. § 17-10-38*. This method of execution is a barbaric residue of a by-gone age.

12. This is not a recent expression of the will of the people of Georgia. Execution by electrocution was adopted in 1924. It is clear that even in Georgia the method has fallen into popular disrepute. On February 26, 1987, for example, the House of Representatives voted overwhelmingly 127-15 in favor of a change in the law that would allow execution by lethal injection.<sup>1</sup> The purpose of this bill was at least to put human beings on an equal footing with animals in the State of Georgia:

"When an animal mauls a child or a dog attacks a human, we give him a shot and we tell our children we put him to sleep," said the bill's sponsor, Rep. Earleen Sizemore, D-Sylvester. "In Georgia, a

<sup>1</sup> See "Lethal Injection Bill Passes House," U.P.I. (February 27, 1985).

person convicted of the death penalty, we give him the electric chair. . . . House Bill 848 offers an alternative to the electric chair."

Even the fifteen votes were not all in favor of electrocution, but included those who rejected outright to notion of execution at all. The only reason this did not become law was because of small number of state senators failed to vote the bill out of committee in time.

13. Currently, there are approximately 135 nations or territories in the world that authorize or utilize legal execution in one form or another. The United States of America is the only nation in the world that allows execution by electrocution.

14. Even in the United States, a very small and dwindling number of jurisdictions allow execution by electrocution. There are now only six states that have actually carried out electrocutions in the recent era and continue to do so. Of these, three have pending proposals to change the law. One other—Nebraska—has only executed one person in the last 30 years. This leaves Alabama and Georgia. At one time or another, there have been 25 jurisdictions that have used electrocution to execute those sentenced to death. Over recent years, the States and the Federal Government have shown an undeniable trend illustrating a national rejection of this method of execution. While ten years ago it may have been "merely" cruel, it is now the case that execution by electrocution is cruel and unusual.

15. Those who have been executed by electrocution in the State of Georgia have, indeed, been required to *suffer* the death penalty, going back a long time in the history of executions in Georgia.

16. The execution of Ed Glover on September 9, 1926 took several minutes, and three "shots" of electricity. "Doctors . . . examined Glover three minutes after the

second 'shot' and pronounced that life had not left him."<sup>2</sup> There have been several occasions when three jolts of electricity have been required before the Georgia electric chair would kill, including the death of John Henry Wright on March 1, 1935,<sup>3</sup> Leonard Brown on May 24, 1937,<sup>4</sup> and Jim Williams on December 9, 1938;<sup>5</sup> sometimes four jolts have been required, an example being the death of Edgar Rose on June 18, 1937;<sup>6</sup> and some executions, including that of Marvin Honea on Dec. 20, 1935,<sup>7</sup> have taken place over several minutes, requiring not two but FIVE jolts of electricity.

17. Indeed, Georgia has taken a long time to execute many of the people who have met their deaths in the Electric Chair. One example is that of Will Hopkins,<sup>8</sup> who did not die for fifteen minutes, apparently still alive after the early shocks. Another is James Morgan, who did not even receive his first shock of three for 31 minutes, and "babbled righteously for 31 minutes while sitting in the electric chair."<sup>9</sup> Even when an effort was made to kill him, another eight minutes went by before he died,

<sup>2</sup> See "Glover Pays in Chair for Dual Killing," MACON TELEGRAPH, September 10, 1926, at 1.

<sup>3</sup> See COLUMBUS LEDGER, March 1, 1935.

<sup>4</sup> See "Brown Forfeits Life In Killing," AUGUSTA CHRONICLE, May 25, 1937.

<sup>5</sup> "Williams' pulse was strong after two shocks, a third was administered and he died at 12:06, eight minutes after the first jolt." See "Georgia Chair Takes Lives of Six Young Negroes for Murder of Three White Men and One Woman," MACON TELEGRAPH, December 10, 1938, at 1.

<sup>6</sup> See ALBANY HERALD, June 18, 1937.

<sup>7</sup> See ATLANTA JOURNAL, December 20, 1935.

<sup>8</sup> This took place on June 14, 1937. See ATLANTA JOURNAL, June 14, 1937.

<sup>9</sup> See "Morgan in Chair for 31 Minutes Before Death Current Turned On," AUGUSTA CHRONICLE, January 8, 1955, at 1.



and "the execution, which consumed 39 minutes, was the slowest in the history of [the Georgia State Prison]." *Id.* At least it was then—Warren McCleskey's execution in 1991 took far, far longer.

18. The Georgia Electric Chair also has a history of burning its victims to a crisp. In just one example, the case of Robert Jones, electrocuted on June 28, 1928, "[t]here was a slight crackling sound from the chair. Robert's body strained under the straps. A curl of blue smoke escaped from under the electrode on the head. Water trickled from the cloth under his face. Smoke curled around his leg as the electrode sizzled through the flesh. The current was suddenly turned off. The body relaxed, twitched a little. Several painful minutes followed in silence. Then the whine of the transformer against as the second shock was sent through the victim's body."<sup>10</sup>

19. In no case does the Electric Chair cause instantaneous death, and the victim must suffer for a prolonged and unnecessary time. However, the particular problems with the Georgia Electric Chair have continued unabated with recent cases. This was the description of the execution of Alpha Otis Stephens on December 12th, 1984, in Georgia:

The first charge of electricity administered today to Alpha Otis Stephens in Georgia's electric chair failed to kill him, and he struggled to breathe for eight minutes before a second charge carried out his death sentence for murdering a man who interrupted a burglary.

\* \* \*

. . . A few seconds after a mask was placed over his head, the first charge was applied, causing his body to snap forward and his fists to clench.

<sup>10</sup> See "Slayer of Short Forfeits His Life," *MACON TELEGRAPH*, June 28, 1928, at 1, 11.

His body slumped when the current stopped two minutes later, but shortly afterward witnesses saw him struggle to breathe. In the six minutes allowed for the body to cool before doctors could examine it, Mr. Stephens took about 23 breaths.

At 12:26 a.m., two doctors examined him and said he was alive. A second two-minute charge was administered at 12:28 a.m.

Mr. Stephens "was just not a conductor" of electricity, a Georgia prison official said.<sup>11</sup> Mr. Stephens had been so terrified at the prospect of being roasted to a crisp in the Georgia Chair that he "apparently tried to take his own life a few hours before the execution."<sup>12</sup> The general sentiment was that this was "a sickening procedure for any civilized society to sanction."<sup>13</sup>

20. Another example of the barbaric and torturous manner in which the State of Georgia imposes execution by electrocution came in the case of Warren McCleskey, who was executed on September 25, 1991. Mr. McCleskey's execution illustrates the manner in which the condemned inmate—in this case, Petitioner—can expect to suffer a lingering and torturous death. Mr. McCleskey was barred from being with anyone associated with him (his family, spiritual advisor, and counsel) for the hours preceding his execution. Then, when he was brought into the execution chamber and asked to make his final statement, his execution was temporarily stayed. He was taken back out of the chamber, and made to wait some more. It was not until the early morning hours that he

<sup>11</sup> See *N.Y. TIMES*, December 17, 1984, at A22.

<sup>12</sup> See "Two Charges Needed to Electrocute Georgia Murderer," *N.Y. TIMES*, December 13, 1984, at A12.

<sup>13</sup> See "Another Jolt," *WASH. POST*, December 14, 1984, at A22; see also Herron, "Georgia Throws the Switch," *N.Y. TIMES*, at December 16, 1984, at A-2.

was taken back into the chamber and tortured to death by means of electrocution.

21. Petitioner is all too aware of the horror of the fate that the State of Georgia has in store for him. Indeed, persons associated with the State of Georgia have gone out of their way to ensure that those in the position of Petitioner should receive a description of the procedure that will result in their deaths. For example, when he was within hours of execution by electrocution in 1993, Petitioner was provided by a state agent with the following description of what the State of Georgia was planning to do to him:

When the executioner throws the switch that sends the electric current through the body, the prisoner cringes from torture, his flesh swells and his skin stretches to the point of breaking. He defecates, he urinates, his tongue swells and his eyes pop out. In some cases I have been told the eyeballs rest on the cheeks of the condemned. His flesh is burned and smells of cooked meat. When the autopsy is performed the liver is so hot it cannot be touched by the human hand.

It is therefore clear that agents of the State of Georgia are more than even deliberately indifferent to the torture that Petitioner will suffer—they actually willingly and intentionally contribute to it.

22. The State of Georgia also contributes to this psychological torture by taking decades to actually execute the individuals who are ultimately killed. Christopher Burger was on Death Row for almost sixteen years, from when he was 17 years old until December 8, 1993. Billy Mitchell was under a death sentence for almost thirteen years to his execution on September 2, 1987. Thomas Dean Stevens, was electrocuted on June 29, 1993, after fifteen and a half years on death row. This makes it psychologically much more difficult for Petitioner, since

he builds up friendships, learns of the torture that his friend has been put through, and then has to await his turn.

23. Overall, Electrocution is both barbaric and senseless, given that a more civilized approach to killing people would also provide Society with the immeasurable benefit of saving the lives of up to ten other people. It violates Petitioner's right to humane treatment, and Society's right to a government that behaves in its best interests.

## CLAIM II.

### PETITIONER'S CONVICTION AND SENTENCE MUST BE REVERSED BECAUSE THE TRIAL JUDGE FAILED TO CONDUCT A COMPETENCY HEARING WHEN THE PROCEEDINGS RAISED A BONA FIDE ISSUE RESPECTING PETITIONER'S COMPETENCY, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. Petitioner was charged with three counts of murder, and the state intended to seek the death penalty. The jury, and all the parties, were aware of the seriousness of the charges and possible penalties.

3. The circumstances surrounding Petitioner's pre-trial, trial, and sentencing proceedings should have alerted the trial judge to the necessity of a competency determination. Petitioner was suicidal, a fact he made known to the trial judge repeatedly.<sup>14</sup> The judge knew, through discovery,

<sup>14</sup> Jail records from the time of Petitioner's arrest through his trial reveal that Petitioner was constantly being seen by psychiatrists and other mental health professionals, and was constantly on suicide watch. He was in need of, but refused, medication. Due to a total lack of an evidentiary hearing on the matter, it is not yet



that Petitioner's parole officer had sought psychiatric care for him immediately before the offense. The judge also knew that Petitioner did not trust and would not cooperate with his attorney, would not speak with his attorney, and wished to stay out of the courtroom. Discussions about staying out of the courtroom raised other indicia of incompetence, which the judge ignored. As will be demonstrated at an evidentiary hearing, all these circumstances "raise[d] a reasonable ground to doubt defendant's competency," and the "trial court's failure . . . to make further inquiry into the accused's competence constituted a *Pate* [v. *Robinson*, 393 U.S. 375 (1966)] violation and denied [Petitioner] a fair trial." *Demos v. Johnson*, 835 F.2d 840, 844 (11th Cir. 1988); see also *Miller v. Dugger*, 838 F.2d 1530 (11th Cir. 1988).<sup>15</sup>

4. There were many things "'suggesting incompetence which came to light during trial.'" *Morrow v. State*, 290 S.E.2d 137, 138 (Ga. 1982) (quoting *Drope*). First, by leaving the courtroom Petitioner severely prejudiced himself in the eyes of the jury, and prevented his attorney from providing effective assistance. So real was that harm that the judge, the prosecutor, and defense counsel all strongly disagreed with Petitioner being absent, and tried

established that the judge was aware of this out-of-court indicator of incompetence. These records are discussed more fully *infra*, see *Claim II*.

<sup>15</sup> Georgia law requires competency to be determined by a jury. O.C.G.A. § 17-7-130(a). Furthermore, in Georgia,

[W]hen evidence was presented indicating incompetency during the trial, there was a duty on the trial judge to inquire into the issue of competency and hold a hearing on the issue.

The constitutional requirements of *Pate* and *Drope* continue throughout the criminal proceedings both prior to and during the main case itself . . . . [T]he actual issue of present incompetence must be addressed if there is evidence of incompetence which manifests itself during the proceedings.

*Baker v. State*, 250 Ga. 187, 297 S.E.2d 9, 12-13 (1982).

to convince him to remain in court. The danger and harm—so obvious to the rational participants—was lost on Petitioner, a circumstance which, in and of itself, should have raised for the participants the issue of incompetence. But it was not just the Petitioner's irrational and plainly self-defeating desire to be absent which should have compelled a judicial competency determination. Purporting to justify his absence, Petitioner revealed that he was patently unable to assist counsel, and that he had no rational or factual understanding of the proceedings or their consequences.

5. First, on February 27, 1987, defense counsel Leipold requested and received an ex parte in camera hearing with the trial judge, and explained his client's bizarre conduct:

MR. LEIPOLD: \* \* \* I have been in the posture where, until yesterday, my client has declined to discuss this case with me, any of the facts surrounding this case.

\* \* \* \* \*

MR. LEIPOLD: Let me amplify briefly, on the record. It is not a situation where Mr. Lonchar is saying that he does not like me, he does not want to talk with me or that we are having a personal dispute—and, Mr. Lonchar, the only response I'd like for you to make, if I am accurate, as to that, is that a yes or no to that?

MR. LONCHAR: (Defendant nods head up and down).

(R. 1-6, February 27, 1987).

6. Four months later, with the trial about to start, the following occurred:

MR. LEIPOLD: Now, we have a matter that is a little bit different. Mr. Lonchar has asked me to make a request of the Court, and he is quite serious

about this. Mr. Lonchar does not wish to remain in court during the conduct of this trial. \* \* \* I have taken strong issue with that—that is all I will say at this point in time—and advised him to the contrary as to that. And I really don't know what to say at this point, Your Honor. That is his position.

\* \* \* \*

MR. LONCHAR: I have my reason. Nothing personal, just, you know—and I have never ever, you know—I have told him three or four different stories and I have never actually told him exactly what happened, and I have my reasons. Like I say—and, so, you know, there is no way they [sic] he can assist me, you know, by being present. I can't assist him because I haven't been assisting him.

MR. LEIPOLD: We have some serious problems right here now with what has just been said. I mean, I don't even know what to go forward with now. I really don't know what Mr. Lonchar is saying at this point.

\* \* \* \*

MR. LONCHAR: But so far as Mr. Leipold, you know, as attorney, I have no objection, he is a very good attorney. But, you know, I do—you know, I just want this over with, you know. Hell, we know the outcome of this, and we are playing all these games. But I haven't, you know, I have never, you know, told Mr. Leipold.

(R. 59 et seq.)

7. After voir dire, again Petitioner illustrated a self-destruction that should have prompted an inquiry into competency. (R. 559-562). More of this happened after several witnesses (R. 1037-38), and again upon his conviction. (R. 1341-1349).

8. The record reveals that the trial judge knew that Petitioner was suicidal, that he had asked police to kill

him, and that he was asking for the death penalty. The trial judge knew that before the offense, Petitioner's parole officer was so concerned about him that she sought psychiatric help for him. He knew that Petitioner was not cooperating with counsel, was acting against his own best interest, and was absent from the courtroom. He knew from the sentencing exhibits that Petitioner had received psychiatric treatment in prison. Under *Drope v. Mississippi*, 420 U.S. 162 (1975), the trial judge had an absolute obligation to conduct a competency determination.

### CLAIM III.

#### PETITIONER WAS TRIED AND SENTENCED TO DEATH WHILE INCOMPETENT, IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. Even had circumstances suggesting Petitioner's incompetence *not* appeared of record to the trial judge, if Petitioner was in fact incompetent at trial and sentencing, his conviction and sentence violate the Sixth, Eighth, and Fourteenth Amendments. *Pate v. Robinson*, 383 U.S. 375 (1966). There is a bona fide doubt regarding Petitioner's competence at trial and sentencing.

3. The record available from the trial raises a bona fide doubt as to competency. Immediately *before* the offense, a parole officer had recognized that Petitioner was in need of mental health care. (R. 206) *After* the offense, the record shows that Petitioner was suicidal, he wanted police to kill him (R. 205), he wanted to get the death penalty (R. 237), he did not want evidence presented for him, he was paranoid about his attorney, he would not speak to his attorney, and he absented himself from the courtroom.



4. Matters not contained in the record also raise a *bona fide* doubt as to Petitioner's competency. First, Petitioner has a documented history of mental illness. Records were readily available but were not obtained by defense counsel. These reveal that Larry Lonchar has a history of mental illness dating back at least to age 13, that his mother and other members of his family suffer from mental illnesses, and that he had been treated for mental illness regularly.

5. Petitioner's history of psychiatric disorders is well documented:

The documented psychiatric records which have been provided to my office for review . . . document Mr. Lonchar's difficult, violent and chaotic adolescence, his "unexplained" behavioral turn for the worse at about age 18, and his subsequent compulsive and uncontrollable behavior throughout the rest of his life.

While admitted for formal psychiatric treatment only once in his life, namely at age 15 when committed through the juvenile courts to the Plainwell Sanatorium, his life history is replete with episodes of truancy, disruptive behavior, and inappropriateness beginning at age 14 and continuing throughout his retention in juvenile facilities or prison with only brief interludes while placed on parole.

Multiple mental health examiners have pointed out Mr. Lonchar's need for intensive psychotherapy. He has frequently been described as both "very labile, nervous and having a high anxiety level." In 1970, a clinical psychologist reported that "Larry has no idea why he follows his impulses without logic or apparent reason." In 1978, another psychological examiner when formulating his clinical opinion of Larry stated, "emotional and physical abuse during

formative years; needs intensive psychotherapy; very frightened and anxious; acts out very impulsively; it is very unlikely that he would callously harm others; immature, insecure, frightened, anxious, emotionally confused."

Despite the multiple notations and identifications of underlying psychopathology in this man, there have been few if any documented attempts to clinically treat his underlying symptoms. According to record, Mr. Lochar or his parole officer contacted the Clayton County Mental Health Center a few days prior to October 13, 1986, the date of the offense for which he is presently sentenced to death, and scheduled psychiatric treatment for him.

Throughout his incarceration before and during trial, medical personnel well documented Mr. Lonchar's psychiatric illness and need for psychiatric treatment. Although they expressed a desire to medicate him for his mental illness, he refused medication. Consequently, he was frequently placed on suicide watch because of the overt manifestations of his depression and the clinical indication as reported by jail mental health examiners that he was at a significant risk of self-harm as a result of his mental status.

*See Affidavit of Dr. Robert Phillips.* The jail records to which Dr. Phillips refers are records kept while Petitioner was on trial for the cases leading to his current predicament. Those records are especially relevant to this claim, because they were kept during the time when it is contended Petitioner was competent.

6. According to Doctor's Progress Notes, not obtained by trial counsel, Petitioner was suicidal and under suicide watch constantly:

## DOCTOR'S PROGRESS NOTES

- 10/31/86 Admitted to DeKalb County Jail
- 11/3/86 Inmate Lonchar is tearful, but co-operative. . . . He admits to seeing a psychiatrist when he was young . . . . He says he feels he has a split personality
- 12/11/86 Pt. seen for psychological assessment. He is very depressed and should be considered a high suicide risk
- 12/11/86 Place on suicide precaution
- 12/15/86 Evaluated by Dr. Pellinger; patent has suicide ideation
- 12/21/86 Insists on seeing psychiatrist because of his nerves
- 12/22/86 Evaluated by Dr. Pellinger, psychiatrist
- 12/22/86 Suicide precautions ordered
- 12/31/86 Inmate is depressed about his situation. States he was hospitalized in Michigan for his nerves some years ago . . . Will check back periodically (evaluation by Dr. Ermutlu)
- 1/21/87 Still feels depressed and anxious . . . will be followed (evaluation by Dr. Ermutlu)
- 1/30/87 Inmate at first did not want to be seen (by Dr. Ermutlu), but eventually came in. He maintains his pessimistic attitude. Appears depressed but refuses to take any medicine . . . . wants no medical attention . . . . the staff should be cautioned to continue watching him (Dr. Ermutlu)
- 1/30/87 Capt. Bishop notified of suicide precautions

- 2/10/87 Complaining of bumps on shoulders, chest, arms, past month itching
- 2/12/87 Examined, hx neurodermatitis, multiple excoriations over chest and upper arms, neurodermatitis, Rx Hytome & Benadryl
- 5/13/87 I recommend that inmate Lonchar remain on suicide watch and refer him to the psychiatrist for evaluation for suicidal ideations. J. Canady
- 5/18/87 Scheduled to be seen [by Psychiatrist] but he is in Court today. Dr. Ermutlu
- 5/20/87 He is pessimistic, does not want to live. Sees no future for himself and does not even want his lawyer to defend him. Should be kept on suicide watch. (Dr. Ermutlu)
- 5/20/87 Tower #2 notified that Dr. Ermutlu continued the suicide watch

7. Thus, a documented history of mental illness, bizarre in-court and out-of court actions during the period in question, and contemporaneous with trial diagnosis of and treatment for mental illness, all point to incompetence. Current psychiatric evaluations do also. Dr. Robert Phillips, after a thorough examination, concluded that Petitioner was incompetent to stand trial.

8. Because petitioner was incompetent to stand trial, retrial is required.



## CLAIM IV.

PETITIONER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL IN VIOLATION OF THE SIXTH AMENDMENT AND *EVITTS v. LUCEY*.

1. Petitioner hereby specifically incorporates by reference all the allegations which are made elsewhere in this pleading.

2. Petitioner hereby specifically alleges that he received ineffective assistance of counsel with respect to each issue which the State alleges was omitted or improperly preserved on his direct appeal to the Georgia Supreme Court. *See Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

3. Additionally, appellate counsel failed to raise an issue that was certainly going to win Petitioner's case. This, although counsel sought out expert assistance on this claim, was given a brief that identified the cases that were precisely on point, and then simply failed to raise the issue, not understanding that it would be procedurally barred if raised later during post-conviction proceedings.

4. During voir dire, the potential jurors revealed a commonly held belief regarding what is meant by life imprisonment—that a person sentenced to life imprisonment would not be imprisoned for life, but would be released in as little as seven (7) years. For example, potential Juror Comm believed a person sentenced to life would serve “[s]even years or 12 years,” (R. 91), potential Juror Pennyman believed it would be “seven years,” (R. 115), potential Juror Baker believed it would be “seven years,” (R. 404), potential Juror Taylor believed it would be “seven years,” (R. 421). Juror Bolton believed life imprisonment meant “just a certain number of years and they are on probation,” (R. 99), juror Jones believed a person could “get out,” (R. 164), Juror Han-

sen believed “they can get out,” (R. 249), Juror Kirkpatrick did not think life meant life, (A. 261), and Juror Jimmy Wilson believed life did not mean life, (R. 299). Other potential jurors believed a person sentenced to life imprisonment could “get out,” (R. 164), that “some do and some don’t” (R. 189), that there was “a chance for parole,” (R. 220), that “they could have their sentence reduced,” (R. 255), that “there are some people let out on probation,” (R. 339), and that life did not mean life. (R. 262, 286, 295, 428).

5. The problem was recognized by the trial court in Petitioner's case:

THE COURT: They are not going to know if they sentence him to life imprisonment that he is going to be eligible for parole in 30 years.

(R. 1395) However, in refusing to instruct the jury on this crucial issue, the trial court left the jurors floundering in their misperceptions. *See, generally, Paduano & Smith, Deathly Errors: Juror Misperceptions Concerning Parole*, 18 COLUM. HUM. RTS. L. REV. 211 (1987) (discussing constitutional implications of jurors' misperceptions concerning parole in Georgia cases).

6. Because the jurors in this case were ignorant of the alternative of life without possibility of parole for at least thirty (30) years defense counsel requested a jury charge that if a defendant was sentenced to three consecutive life sentences, he would be required by Georgia law to serve a minimum of thirty years in prison. (R. 1332). Counsel for the State stipulated that that was the law, and that the members of the Georgia Board of Pardons and Paroles would follow that law in Larry Lonchar's case. (R. 1338, 1361). The state objected to the charge because Georgia law forbids use of the word “parole,” but defense counsel did not insist that the word parole be used. (R. 1337). The judge refused the re-

quested instruction, and the proffered testimony. (R. 1361).

7. After considerable deliberation, the jury sent a question to the judge. Then the following record discussion occurred:

THE COURT: The question is: "Does life imprisonment mean—does life imprisonment on each [of three] count[s] mean the sentence will be served consecutively?" I can't answer the question. That was the question that I received from the jury.

MR. LEIPOLD: My response would be the appropriate answer would be that is within the discretion of the Court, which I think is the truth and a correct response, and I don't think it injects anything into the case.

THE COURT: What do you say?

MR. PETREY: The first response, Your Honor, you can't answer that question. That would be our request on that.

(R. 1457-58). The court refused to answer the sentencer's question. (R. 1465).

8. As a matter of federal constitutional law, the jury should have been instructed accurately on their sentencing alternatives, granted the ample evidence that they were speculating inaccurately. "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 108 S. Ct. at 1986 (quoting *Gardner v. Florida*, 430 U.S. 349, 363-64, 97 S. Ct. 1197, 1207-08, 51 L. Ed. 2d 393 (1977)). As noted previously, the United States Supreme Court has held that "even in a noncapital sentencing proceeding, the

sentence must be set aside if the [sentencer] relied at least in part on 'misinformation of constitutional magnitude' . . . ." *Zant v. Stephens*, 462 U.S. at 887 n.23 (quoting *United States v. Tucker*, 404 U.S. at 447-49).

9. As a matter of Georgia law, certainly when the jury returned with a question they should have been instructed, at a minimum, that such speculation would violate their oaths:

If . . . the jury asks to be instructed about the possibility of parole, the court should mention the issue . . . to the extent of telling the jury in no uncertain terms that such matters are not proper for the jury's consideration.

*Quick v. State*, 256 Ga. 780, 353 S.E.2d 497, 503 (1987) (footnote omitted).

10. Counsel on appeal was inexperienced in this matter, and talked the issues over with expert counsel, who provided him with a brief on the point, that cited precisely to the *Quick* case. Counsel simply failed to raise this clearly meritorious issue in the appellate brief, for no strategic or tactical reason. This was patently ineffective.

11. Alternatively, Petitioner should be granted relief on the merits of this claim, any allegations of default notwithstanding.



## CLAIM V.

DEFENSE COUNSEL UNREASONABLY AND PREJUDICIALLY FAILED PROPERLY TO INVESTIGATE AND PRESENT HIS CLIENT'S BACKGROUND AND MENTAL STATE, WITH THE RESULT THAT EVIDENCE OF INSANITY, INCOMPETENCY, INVALID WAIVERS OF CONSTITUTIONAL RIGHTS, AND COMPELLING EVIDENCE IN MITIGATION OF PUNISHMENT WAS NOT PRESENTED, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. Defense counsel was repeatedly put on notice that Larry Lonchar's mental condition was, or should have been, a significant factor in his trial and sentencing. Counsel did have Larry Lonchar "evaluated" seven months before trial and sentencing, but he neither gathered nor provided any background information to the evaluator, information that was critical for a proper diagnosis; that evaluation was *per se* insufficient, based as it was primarily on a simple mental status exam and upon an incomplete and invalid psychological assessment; that evaluation occurred seven months or more before trial, and no further evaluation occurred; the evaluation did not address mitigating circumstances, or ability to waive constitutional rights; and the "psychiatrist" did not know about the documented jail-house mental health problems, about the parole officer's concern pre-offense about Larry Lonchar's psychiatric condition, or that previous prison records revealed and documented Larry Lonchar's psychiatric disorders. Because of trial counsel's inadequate preparation and performance, Petitioner's right to effective assistance of counsel and to a competent mental health evaluation was violated.

3. After this singularly inadequate evaluation was conducted, counsel learned: that his client did not trust him, had not cooperated with him, and intended to act in manner that was not in his best interest; that his client would and did refuse to attend his own trial; that his client had received psychiatric treatment in the past, and, that petitioner's natural mother was mentally ill, and had been for most of Petitioner's life.

4. Counsel also knew that after the offense his client "[w]as white as a sheet, his eyes were big around, sticking out of his head," (R. 908) that when he was arrested he exhorted the arresting officer to "Go ahead and shoot me. Shoot me," and "Go ahead and kill me, kill me." (R. 1002). He knew that when his client was interrogated, he told the police "he was going to plead guilty and die in the chair," he was "very upset," and "he began shaking and trembling." (R. 1061, 1075).

5. Counsel also knew, or should have known, that Petitioner's parole officer immediately before the offense recognized that Petitioner was in need of mental health intervention, and scheduled such treatment. The offense occurred two days before the scheduled appointment (R. 206).

6. With the new information he *did* have, counsel was obligated to ensure that Petitioner was properly evaluated. Counsel was obligated *ab initio* to ensure that a competent mental health evaluation occurred, but certainly by the time of trial and/or sentencing counsel should have known that the issue had to be addressed again, and *properly*. Counsel failed to address the issue, to his client's clear prejudice.

7. Defense counsel provided no or grossly insufficient background information to the examiner, especially evidence independently gathered.

8. Had counsel properly looked into Petitioner's prior incarceration records, he would have discovered docu-

mented state recognition of Petitioner's mental illness. Those records document Larry's difficult, violent, and chaotic adolescence, his "unexplained" psychiatric turn at about age 14, and his subsequent impulsive behavior throughout the rest of his life.

9. As already discussed, but here, as revealed in records, Larry was born September 3, 1951, in Battle Creek, Michigan. He lived with his parents, grandparents, and siblings in a small brick house in an inter-racial neighborhood. His mother was and is mentally ill, and has taken psychotropic medication for years by prescription. His father was and is an alcoholic. He abused Larry and his mother, psychologically and physically, while Larry was growing up. See 4/20/71 Report; 4/21/78 Report.

10. Larry was nevertheless an above average student until the eighth grade. "Then, *very suddenly*, [he] began to have serious problems." Report, 1/1/76, p.5. Truancy, disruptive behavior, inappropriate behavior, and criminal behavior followed. Starting at age 14-16, he spent the rest of his life in either juvenile facilities or prison, with brief interludes on parole, usually with his mentally ill mother. According to his mother, according to defense attorney records (which counsel failed to follow up), and according to prison records, Larry was committed to a "sanitarium" at age 15 (see 12/24/69 Report, "BTS 1966") and was constantly in and out of juvenile facilities thereafter.

11. Because of a series of offenses in 1969, Larry was arrested as an adult. His mother advised that he was in need of psychiatric treatment. He was evaluated by Dr. Myron A. Tazelaar, M.D., with reference to sentencing alternatives and based on that evaluation, the probation agent concluded that: "In view of his [Dr. Tazelaar's] remarks and all of the other factors taken into consideration . . . I do not feel at the present there is anything that we have to offer" other than jail, "so that Larry can

be protected from himself . . . ." Report, 12/17/69. Other reports show:

- 1/12/70 clinical psychologist's test results—Larry "has no idea as to why he follows his impulses without logic or apparent reason"
- 4/28/71 Mrs. Lonchar suffers from nerves and other ailments and takes tranquilizers in rather large large quantities
- 1/21/76 "rap sheet"; abusive environment
- 5/28/75 psychoneurotic symptoms; plagued with feelings of insecurity and inadequacy grossly disproportionate to his realistic situation; impulsive, dangerous, highly instable, homicidal; needs intensive psychotherapy
- 7/9/76 multiple offender who has demonstrated impulsive and erratic behavior
- 4/20/78 very nervous; high anxiety level
- 4/21/78 due to abusive environment, "at . . . age 13, . . . [he] began to escape to the streets."; free floating anxiety and raw nerves; a pattern of dealing with a hated self by periods of frenzied activity; totally bewildered and sick at heart; tragic nature of self-destruction pattern
- 5/31/78 "emotional and physical abuse during formative years; needs intensive psychotherapy;" very frightened and anxious; acts out very impulsively; "it is very unlikely that he would callously harm others"; immature, insecure, frightened, anxious, emotionally confused.

12. As already discussed above, jail records maintained before and during trial reveal that jail personnel believed Petitioner was psychiatrically ill, they wished to medicate him, and he was constantly placed on suicide watch.



13. Dr. Robert Phillips conducted a physical and neurological examination of Petitioner, resulting in the discovery of evidence of neurological brain damage. As his report reveals:

Finally, I am of the opinion, within a reasonable degree of medical certainty, that there exists both supportive clinical and historical evidence at the time of my examination, making the indications rather high that Mr. Lonchar has underlying brain damage as manifested by abnormal pupillary dilation, bilateral single beat nystagmus, in the face of historical evidence of significant head trauma and possible seizure disorder. Such brain damage would further substantially contribute to rendering this individual less effective in meeting the standards expected for his age.

*See Affidavit of Dr. Phillips.*

14. It is clear that the examination prior to Mr. Lonchar's trial missed all the physiological indicators of his mental illness, apparent even to a lay person such as his sister, Christine.

15. While Mr. Lonchar was briefly examined by a psychologist seven months before trial, that psychologist himself acknowledged that he gave few tests to Petitioner, and that those few were mostly invalid. Mr. Lonchar was also briefly evaluated by a psychiatrist seven months before trial, who conducted a mental status exam.

16. Had Petitioner's counsel conducted a background investigation, documented Petitioner's history of mental illness and his mental illness in the jail, and had proper physical, neurological, and diagnostic exams been performed rather than relying almost exclusively upon a mental status exam, there is a reasonable probability that the result in this case would have been different.

17. Additionally, trial counsel failed to develop and present the defense that co-defendant Wells and another co-defendant were responsible for the killings, as the chief

eyewitness testified, and that this was against Mr. Lonchar's expectations and desire.

18. Trial counsel failed adequately to investigate and impeach the story put out by co-defendant Wells.

19. Trial counsel failed adequately to develop and present evidence at the penalty phase concerning Mr. Lonchar's state of mind.

20. Trial counsel failed to locate and present Mr. Lonchar's many friends who, as potential witnesses at the penalty phase, could have testified to Mr. Lonchar's many redeeming qualities. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). Counsel failed to secure and present critical evidence relating to Petitioner's history of incarceration which would have negated the effect of the illegitimate introduction of Petitioner's prior convictions. As a consequence, the jury was precluded from evaluating important evidence of Petitioner's potential for adapting to the prison environment. *See Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986).

#### CLAIM VI.

NOT ONLY DOES THE LAW NOT ALLOW A PERSON TO WAIVE HIS OR HER PRESENCE AT A CAPITAL TRIAL AND SENTENCING PROCEEDING, BUT EVEN WERE THIS NOT THE CASE THE INQUIRY BY THE TRIAL JUDGE WAS INSUFFICIENT TO DEMONSTRATE A KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER OF THAT RIGHT BY PETITIONER, AND PETITIONER IN FACT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HIS RIGHT TO PRESENCE.

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. The right to be present when one is on trial for one's life is non-waivable, and thus any purported "waiver" made by Petitioner has no legal effect. *See, e.g., Proffitt v. Wainwright*, 685 F.2d 1227, 1257-58 (11th Cir. 1982).

3. When Petitioner raised this issue on direct appeal, the Georgia Supreme Court allowed such a "waiver", and concluded that Petitioner understood his rights and the dangers of leaving, "or should have, because the court so advised him." However, because of Petitioner's mental illness it is now clear that he in fact did not knowingly, voluntarily, and intelligently waive his right to presence, and had the trial court or trial counsel acted properly vis-a-vis Petitioner's bona fide issue of incompetency, the result in this case would have been different.

4. Because Petitioner did not knowingly and intelligently waive his right to presence, retrial is required.

#### CLAIM VIII.

THE STATE INTRODUCED CONVICTIONS PREDICATED UPON GUILTY PLEAS WHICH WERE UNCONSTITUTIONALLY OBTAINED AND WHICH, ON THEIR FACE, REVEALED 1) THAT THEY WERE NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTERED, AND 2) WERE TAKEN WITHOUT THE ASSISTANCE OF COUNSEL; IN ADDITION, THE PLEA TRANSCRIPTS INTRODUCED CONTAINED REFERENCES TO OTHER UNCONVICTED CRIMINAL ACTS, ALL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, REQUIRING RESENTENCING.

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. The only evidence introduced by the State at sentencing was Exhibits 2-6. These exhibits revealed five

prior convictions of Petitioner, which the State labeled Petitioner's "resumé":

When Larry Lonchar comes before you, in the presence of you, and through his attorney ask you for mercy, here is his resume, that is his resume.

(R. 1410). The prosecutor had discussed Petitioner's prior record for three pages of transcript before this "resumé" argument, and continued to stress Petitioner's record as a prime basis for death throughout his closing argument. As the United States Supreme Court emphasized in *Johnson v. Mississippi*, 108 S. Ct. 1981 (1988), any error in the introduction of invalid prior convictions is especially prejudicial where the convictions are emphasized by the prosecuting attorney in closing argument:

We eschew 'harmless error' in our reasoning . . . because the district attorney argued this particular aggravating circumstance as a reason to impose the death penalty.

*Id.*, 108 S. Ct. at 1989 n. 8 (quoting *Johnson v. State*, 511 So. 2d 1333, 1338 (Miss. 1987)).

3. Exhibits 2-6 were inadmissible, on account of a variety of constitutional and statutory defects described below:

a-1. *Exhibit 1*<sup>16</sup>—This involved a conviction and sentence entered December 22, 1969, for the offense of

<sup>16</sup> The State had pre-marked six exhibits, 1-6. What the State had originally tendered as Exhibit 1 at sentencing was excluded. This "Exhibit" appears in Volume VI, record on appeal, immediately after p. 1644. The actual exhibit 1 appears at and after p. 1645, although it was pre-marked and remained marked as State's Exhibit Sentencing 2. All of the 11 pages appearing after p. 1645 were introduced, as the designation at the bottom of the pages indicate. Each page was pre-marked "SS2" as State's Sentencing 2.

All 5 exhibits were treated in this way. Hence, State's Sentencing Exhibit No. 2, appearing after page 1646 was pre-marked



breaking and entering. The plea was taken November 21, 1969, and the plea transcript reveals that the plea was not knowingly, intelligently and voluntarily entered. Petitioner was not properly advised regarding, and hence did not waive, all of the rights embodied in trial by jury. He was not advised of the presumption of innocence, the right to confrontation, the right to cross-examination, the right to silence, the right to testify, the right to have no comment made regarding his silence, the right to the assistance of counsel, the right to appeal, etc.

a-2. The pleas was plainly entered in violation of *Boykin v. Alabama*, 395 U.S. 238 (1969), and the conviction and sentence were inadmissible in this capital sentencing proceeding. Additionally, the plea transcript included reference to a separate two count indictment which contained in Count 1 a charge against Petitioner of attempted robbery with a 22 calibre revolver.

a-3. He purportedly then pled to Count two, larceny. Exhibit 1 does not contain that two count indictment, or a judgment of conviction. The purported plea colloquy was clearly inadmissible, because no conviction was introduced. The jury was therefore led to believe that Petitioner had more convictions than the prosecution actually presented. The United States Supreme Court first recognized over forty years ago that due process prohibits the sentencer from relying, even in part, on false representations regarding the accused's prior convictions. See *Townsend v. Burke*, 334 U.S. 736 (1948); accord *Johnson v. Mississippi*, 108 S. Ct. at 1987. This "evidence" was also inadmissible because, like the breaking and entering plea, it was taken in complete disregard of the *Boykin* requirements.

b-1. *Exhibit 2*—This involved a conviction for burglary supported by a plea entered December 8, 1969.

"State's Sentencing Exhibit 3" and every page contains "SS3" at the lower right hand corner. All reference here to the Exhibits will be to the *admitted*, not the pre-marked, number.

On the face of the plea colloquy it is revealed that Petitioner was not represented by counsel, but represented himself at the hearing. As the United States Supreme Court "held in *United States v. Tucker*, 404 U.S. 443, 447-49, 92 S. Ct. 589, 591-93, 30 L. Ed. 2d 592 (1972), even in a noncapital sentencing proceeding, the sentence must be set aside if the [sentencer] relied at least in part on 'misinformation of constitutional magnitude' such as prior uncounseled convictions . . . ." *Zant v. Stephens*, 462 U.S. 862, 887 n. 23, 103 S. Ct. 2733, 2748 n. 23, 77 L. Ed. 2d 235 (1983); accord *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258 (1967).

b-2. Even under the standards required in a criminal case where there is no doubt as to the mental state of the accused, there was no valid waiver of counsel, as Petitioner was not advised of the dangers and disadvantages of self-representation. *Faretta v. California*, 422 U.S. 806 (1975).

b-3. Petitioner was not advised of the presumption of innocence, the right to silence, the right to testify, the right not to testify and not to have that used against him, the right to appeal, etc. The plea was plainly taken in violation of *Boykin*. Before a defendant can make any waiver, the State must make a showing that a waiver has been made "with a full understanding of what [it] connotes and its consequences. . . ." *Boykin v. Alabama*, 395 U.S. at 243-44; see also, *McCarthy v. United States*, 394 U.S. 459, 466 (1969). The Georgia Supreme Court has held the same, noting that when the voluntariness of a guilty plea is presented, "the burden is on the state to establish a valid waiver." *Pope v. State*, 256 Ga. 189, 345 S.E.2d 831, 844 (1986) (emphasis supplied).

b-4. In *Fay v. Noia*, 372 U.S. 391 (1963), the United States Supreme Court held that the State must show that the:

applicant, after consultation with competent counsel or otherwise, understandingly and knowingly fore-

went the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as . . . deliberate . . . .

*Id.* at 439. Respondent's burden is therefore a heavy one and has not been met in this case.

c. *Exhibit 3*—This exhibit included a two count indictment, and a plea transcript. The indictment charged two crimes, burglary and larceny. Mr. Lonchar pled *only* to larceny, but the jurors, through the plea transcript and indictment, were exposed to the unconvicted charge of burglary. Furthermore, during the plea colloquy, Petitioner confessed to a completely unrelated uncharged, and unconvicted offense. Finally, the plea was taken in violation of *Boykin*. (R. 1642).

d. *Exhibit 4*—This exhibit included a two count indictment charging robbery and larceny. A plea was entered to larceny. During the plea, evidence was introduced that Petitioner was on parole, and the he could be sentenced for the offense of committing an offense while on parole. Count I, the robbery count, was dismissed. *Another* robbery charge, completely unrelated to the charge in Exhibit 4, was also discussed: "Count I would be dismissed together with another charge, that of armed robbery of the Spring Lanes Bowling Alley, I think File Number 28-62."

e. *Exhibit 5*—This exhibit involved a two count indictment charging armed robbery and possession of a firearm during the commission of a felony. A plea was entered to both counts. During the taking of the pleas, the Court commented that, "before we get started, not too long ago *on another case* you changed your mind about offering a plea, which, of course, is your privilege." He also told the Petitioner that he had committed the crime of being a repeat offender, which was not charged. Defense counsel referred to other charges and potential

charges, that would either be dismissed or not instituted: 1.) a pending case of armed robbery and possession of a firearm during commission of an offense, 2.) a pending case of felonious assault and possession of a firearm, and 3.) habitual criminal charges.

4. In each of these cases, the prosecution was allowed to submit records which indicated that Petitioner would be granted parole, or early release. In State's Exhibit 4, the sentencing judge made extensive reference to the question of parole. (Exh. 4 at 3-4; *see also* Exh. 5 at 3-4) This was in flagrant violation of this State's policy, which requires an automatic mistrial if the jury is tainted by reference to parole. *See O.C.G.A. § 17-8-76*. As the Supreme Court of Georgia recently stated, "a defendant's parole eligibility is not, and ought not to be, an issue considered by the jury in the sentencing phase of a capital trial." *Quick v. State*, 256 Ga. 780, 353 S.E.2d 497, 503 (1987) (*citing Westbrook v. State*, 256 Ga. 776, 353 S.E.2d 504 (1987)).

5. In each of these cases, where counsel was provided, Petitioner did not receive the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

#### CLAIM VIII.

#### THE PREDICATION OF A CONVICTION FOR MURDER AND A DEATH SENTENCE ON A THEORY WHICH THE PROSECUTOR KNOWS TO BE FALSE CANNOT WITHSTAND REVIEW UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. This case involves three deaths and at least two co-defendants. As the trial judge candidly acknowledged at co-defendant Wells' sentencing:



THE COURT: Let me tell you what the Court's concern is. I know what Mr. Wells' contention is. I sat through one trial of this case. I don't know, I assume all those deputies here did, too; I don't know. Anyway, given what the sentence was in the other case, I know what his contentions are, and I have got some doubts about, you know, who actually did what, based on a lot of what Dr. Burton's testimony was about what bullets did what to whom. Y'all heard the same evidence I did.

(R. 14, plea of co-defendant Wells after Petitioner's death sentence, Judge speaking to prosecutor).

3. It was then, for the first time, that the prosecutor conceded that he had pursued Mr. Lonchar's conviction and death sentence on a theory—dependent upon Wells' story—that was false:

Mr. Wells statement, Your Honor, that he abandoned the enterprise, obviously this Court should take that statement with a grain of salt. Obviously he is in a position where he is going to try to minimize his losses and try to lay the blame on Larry Lonchar.

(R. 50, plea of co-defendant Wells, prosecutor speaking to Court).

4. On information and belief, the prosecution has still to reveal evidence which will demonstrate still more clearly that the conviction and death sentence against Mr. Lonchar were improperly obtained.

## CLAIM IX.

BY REFUSING ACCURATELY TO INSTRUCT THE JURY REGARDING WHAT WOULD OCCUR IN THE EVENT A UNANIMOUS DECISION COULD NOT BE REACHED REGARDING SENTENCE—PARTICULARLY WHEN THE JURORS RETURNED TO COURT AND ASKED THAT EXACT QUESTION—THE TRIAL COURT VIOLATED PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. Defense counsel requested that the trial judge instruct the jury, accurately and in accordance with Georgia law, that one verdict they were entitled to return was: "We, the jury, are not able to reach a unanimous verdict." (R. 310, 1393). Unlike the first phase of a capital trial in Georgia, where a non-unanimous verdict is a mistrial that requires retrial, a non-unanimous verdict at capital sentencing is a verdict that results in imposition of a life sentence, *not* resentencing. The requested charge was denied. (R. 1394)

3. After considerable deliberation, the jurors asked a question of the judge:

THE COURT: You are going to love this one: "We'd like you to instruct us as to what we do if we cannot reach a unanimous decision."

(R. 1467). The Court's response to the jury was that he would not accept a decision "at this point," and he refused to answer the jurors' question about what would happen if the jurors were not unanimous.

4. The jurors continued deliberating, and after seven hours could not reach such a decision. Only after coming back the next day—Saturday—were they able to deliver the verdict.

## CLAIM X.

THE FAILURE TO INSTRUCT THE JURY THAT THEIR EVALUATION OF THE EVIDENCE ADDUCED IN MITIGATION MUST BE MADE INDIVIDUALLY DEPRIVED PETITIONER OF HIS RIGHT TO MEANINGFUL CONSIDERATION OF HIS MITIGATING EVIDENCE.

1. All other claims in this petition are incorporated in this claim by reference.

2. No principle of Eighth Amendment law can be clearer than the requirement that jurors be required to consider any evidence proffered by the defense in mitigation. *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Bell v. Ohio*, 438 U.S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982).

3. In this case, not only were the jurors not told that they *could* make a non-unanimous finding which would result in a life sentence, *see*, § XX, but they were also not told that they *must* individually evaluate the evidence in mitigation, in light of the aggravating circumstances.

## CLAIM XI.

THE SENTENCERS IMPROPERLY WERE ALLOWED TO IMPOSE DEATH VIA AN AGGRAVATING CIRCUMSTANCE THAT WAS UNAVAILABLE UNDER GEORGIA LAW, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

1. All other allegations in this Amendment and in the initial petition are incorporated into this claim by specific reference.

2. The sentencers were instructed that each offense in this case served as aggravation for the other two offenses, contrary to the law in Georgia. The jury *found* this aggravation, as they were instructed they could.

3. At sentencing, the prosecutor argued:

You have to find that this murder occurred, or these three murders, occurred when the defendant was in the process of committing another kind of capital felony, such as murder. That is present in this case.

(R. 1403).

4. The jury was instructed:

Under the laws of the state of Georgia the following may constitute statutory aggravating circumstances: First, where the offense of murder was committed while the defendant was engaged in the commission of another capital felony or aggravated battery . . . . [I]n this connection, the offense of murder as (sic) a capital felony under our law.

(R. 1437).

5. The jurors found two statutory aggravating circumstances for each offense: 1.) "the offense of murder was committed while the offender was engaged in the commission of another capital felony and aggravating battery," (R. 248-50), and 2.) that the offense was outrageously and wantonly vile, horrible and inhuman.

6. Under Georgia law, two offenses may not aggravate each other. *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974). The death sentences were imposed in an arbitrary manner because the jury was allowed to act in a way different from other jurors in other cases, in violation of the Eighth and Fourteenth Amendments. Appellate counsel unreasonably and prejudicially failed to raise this claim on direct appeal, in violation of Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.



## CLAIM XII.

GEORGIA'S STATUTORY AGGRAVATING CIRCUMSTANCE "OUTRAGEOUSLY AND WANTONLY VILE, HORRIBLE AND INHUMAN" WAS UNCONSTITUTIONALLY APPLIED IN THIS CASE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

This claim is evidenced by the following facts:

1. All other allegations in this Amendment and in the original petition are incorporated into this claim by specific reference.
2. Petitioner's jury was instructed that it could impose death if it found the offense "was outrageously or wantonly vial [sic], horrible or inhuman *and, second*, that it involved at least one of the following: Torture or depravity of mind or an aggravated battery to the victim." (R. 1438-39) (emphasis added). This aggravating circumstance required the finding of two things: 1.) outrageously or wantonly vile, horrible or inhuman and 2.) torture, or depravity of mind, or an aggravated battery.
3. No definition of the phrase "outrageously or wantonly vile, horrible, or inhuman" was given. No evidence of torture existed, and any aggravated battery inhered in the crime.
4. The jury in this case was *not* informed what vile, horrible, and inhuman meant. Further, in the present case, the facts and evidence do not support the jury's finding under a constitutionally valid interpretation of O.C.G.A. § 17-10-30(b)(7). Furthermore, the Georgia interpretation of this circumstance in no way meets constitutional norms.
5. The death sentence in this case violates the Sixth, Eighth, and Fourteenth Amendments, and appellate coun-

sel provided ineffective assistance by unreasonably and prejudicially failing to raise this issue upon direct appeal.

## CLAIM XIII.

THE TRIAL COURT EXCUSED FOR CAUSE POTENTIAL JURORS ON THE BASIS OF ALLEGED OPPOSITION TO THE DEATH PENALTY, ALTHOUGH THE JURORS' VIEWS EXPRESSED DURING VOIR DIRE NEITHER PREVENTED THEM FROM CONSIDERING, NOR SUBSTANTIALLY IMPAIRED THEIR ABILITY TO CONSIDER, IMPOSING A DEATH SENTENCE, AND THE TRIAL COURT CONDUCTED VOIR DIRE ON THIS ISSUE IN A CONSTITUTIONALLY IMPERMISSIBLE MANNER, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

1. All other allegations in this petition are incorporated into this claim by specific reference.
2. Potential juror Ronald L. White expressed reservations about imposing the death penalty, but his reservations were, at best, equivocal. On questioning by Petitioner's counsel, Mr. White stated that it was possible he would vote for the death penalty under certain circumstances. (T. 466). After further questioning by the Court, the State moved to excuse Juror White based on his alleged opposition the to death penalty. (T. 469). Petitioner's counsel objected not only to the disqualification of Mr. White, but to the trial court's entire procedure for conducting voir dire on this crucial issue:

MR. LEIPOLD: First, I have a motion in the form of an objection, which is to the Court, again, questioning the man. I think that at some point, and I think we have passed the line of neutrality when it comes to questioning of these potential

jurors. The Court, in effect, is rehabilitating these jurors for the state with its questions. The appropriate way for it to be done is for the Court to ask the question and counsel examine the jurors as to the responses they gave. For you to ask initial questions, for me to then get up and then effectively rehabilitate, for the District Attorney to get up, and for the Court to do it last again, with the authority and the power that you cloak, and by placing the emphasis on it, I think it is improper and I object to you handling it in that manner, again questioning the juror, repeatedly questioning and eliciting answers that are different from my questions [sic], to the very same questions. I think this juror's answers are totally ambivalent to his feelings on the death penalty, and I think it is clear that he should not be excused on the basis of any standards concerning *Witherspoon*.

(T. 469-70). The trial court granted the State's motion to excuse Mr. White for cause, (T. 471), despite Mr. White's assurance that he could consider the death penalty under certain circumstances.

3. Potential juror Virginia L. Nichols stated that it would be "difficult" for her to impose the death penalty. Ms. Nichols did not say that she could never impose the death penalty, and did not say that her hesitations about the death penalty would prevent or substantially impair her ability to follow the law and consider fairly the imposition of the death penalty. The State moved to excuse Ms. Nichols based on her purported opposition to the death penalty. (T. 132). Over defense objection, the trial court excused Ms. Nichols. (T. 133-34).

4. These actions by the trial judge violated Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

#### CLAIM XIV.

THE TRIAL COURT REFUSED TO EXCUSE FOR CAUSE POTENTIAL JURORS WHO STATED DURING VOIR DIRE THAT THEY WOULD AUTOMATICALLY IMPOSE THE DEATH PENALTY UPON A FINDING THAT PETITIONER WAS GUILTY OF THE CRIMES WITH WHICH HE WAS CHARGED, IN VIOLATION OF PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

1. All other allegations in this petition are incorporated into this claim by specific reference.
2. Potential juror Robert Emory Reese stated unequivocally during voir dire that if he were to find Petitioner guilty of murder, he would automatically impose death.

MR. REESE: I think [the death penalty] is appropriate in some cases.

MR. LEIPOLD: Can you give me an idea of the kind of cases?

MR. REESE: I guess premeditated murder, which is, one of the stipulations in the law of Georgia.

MR. LEIPOLD: *Do you think that anyone who commits a premeditated murder should receive the death penalty if they are convicted of that crime beyond a reasonable doubt?*

MR. REESE: *I suppose so, at this point.*

MR. LEIPOLD: You suppose so?

MR. REESE: *Yes.*

(T. 104-05). Petitioner's counsel moved to exclude Mr. Reese for cause. (T. 107). The trial court denied the motion. (T. 110).



3. Potential juror Alex M. Wrigley similarly indicated during voir dire his belief that the only appropriate punishment for the taking of human life was the death penalty. (T. 137). A defense motion to strike Mr. Wrigley for cause was denied. (T. 138-39).

4. Potential juror Scott Daniel Walker was committed to voting for the death penalty if he found Petitioner guilty of the three murders with which Petitioner was charged.

MR. LEIPOLD: In a real case with real people, *if you determine to your satisfaction that a person has taken three human lives, could you think of any situation where you would not favor the death penalty?*

MR. WALKER: *No.*

(T. 210). A defense motion to exclude Mr. Walker for cause was denied. (T. 213-15).

5. Potential juror Eleanor C. Martin, when asked whether she could conceive of any situation involving the deliberate taking of a human life in which she would not favor imposition of the death penalty, responded that she would have to say "No." (T. 241). The trial court denied a defense motion to strike Ms. Martin for cause. (T. 243, 245).

6. These actions by the trial judge violated Petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

#### CLAIM XV.

DETECTIVE CHARLES E. BUIS INJECTED HEARSAY EVIDENCE OF PETITIONER'S BAD CHARACTER, EXTRANEOUS CRIMINAL ACTIVITY BY PETITIONER, AND AN UNADJUDICATED CRIMINAL OFFENSE OF PETITIONER'S INTO PETITIONER'S CAPITAL TRIAL, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. The crimes for which Petitioner was tried occurred in DeKalb County, Georgia on October 13, 1986. A week later, Petitioner was arrested in Mission, Texas.

3. Detective Charles E. Buis testified for the State at Petitioner's trial. As part of his testimony, Detective Buis explained how the police knew to look for Petitioner in Texas:

MR. RICHTER: How did you become aware that the defendant might possibly be located in Mission, Texas?

MR. BUIS: *One of our detectives had received information that the defendant had possibly gone to Mission, Texas, to stay with someone that he knew that we were informed was a local drug dealer in Mission, by the name of Alex, and I believe later the last name Cavazos came up.*

(T. 1028). The detective who allegedly received the information did not testify, depriving Petitioner of any meaningful opportunity for cross-examination on the statement that he was staying with a "local drug dealer" in Texas.

4. Detective Buis' testimony placed Petitioner's character in issue, mentioned extraneous criminal activity not

probative of any issue in Petitioner's case, and injected evidence of a crime for which Petitioner had been neither indicted nor convicted into Petitioner's trial.

5. Petitioner's trial counsel immediately objected to Detective Buis' testimony, and asked for a mistrial based on the hearsay testimony impugning Petitioner's character. Like defense counsel, the trial court was appalled by Detective Buis' testimony:

I can't believe you did that. This is the second or third time your testimony—first of all you start off by characterizing the tape, giving your interpretation, and then make a statement like that. I don't understand that.

(T. 1030). However, the trial court refused to declare a mistrial. Instead, the court gave the jury a cautionary instruction:

**THE COURT:** Ladies and Gentlemen of the jury, this witness made a remark—I forget the person's name—whoever the person was in Texas, he had made some characterization of that person as a possible—of possibly he had some information this person might be involved in some sort of activity down in Texas—the other person who was driving the car at the time. I believe you have heard some testimony about that person. And this witness made some comment about that person's possible activities in some sort of illegal participation. That was completely irrelevant and has absolutely nothing to do with this trial. I have already instructed the witness that I will get on his case real bad if he does it again. But it really has nothing to do with this trial and I will ask you to disregard any kind of remark that he made about that. Okay? It has nothing to do with this trial whatsoever.

(T. 1033). The trial court's attempted curative instruction was inadequate, both because (a) the damage done

to Petitioner in the eyes of the jury was irreparable, and (b) the instruction never once informed the jury that any inference about Petitioner's character, and other illegal acts and unadjudicated crimes, arising from Detective Buis' testimony should play no role in their decision; the jury was simply told that information about another person's allegedly illegal behavior was irrelevant in Petitioner's trial.

#### CLAIM XVI.

#### DURING THE JURY DELIBERATIONS AT THE SENTENCING PHASE OF PETITIONER'S TRIAL, THE ALTERNATE JURORS WERE PERMITTED TO DELIBERATE IN THE JURY ROOM WITH THE JURY, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

1. All other allegations in this petition are incorporated into this claim by specific reference.
2. While the jury in Petitioner's case was deciding whether Petitioner should live or die, the alternate jurors were in the jury room participating in the deliberations. Upon learning of this, Petitioner's trial counsel immediately objected and moved for a mistrial.

**MR. LEIPOLD:** [I]t has come to my attention apparently the alternates have continued to be in the jury room with the jurors during the morning period of time. It is my contention that at the conclusion of the [guilt phase] deliberations in this case the alternates could, at that point, have absolutely nothing to do with this case, under any circumstances whatsoever. I think that it was an error to allow them to maintain themselves here, and I think it was definite error to allow them to go into the jury room this morning.



My motion is for a mistrial on the ground this jury has been—that the alternates have been allowed to mingle with this jury and they have been approximately one hour this morning in the jury room with the 12 members of the jury. But, by law, they must have been excused at an earlier time, and it was an error to allow them to be in the jury room.

(T. 1427-28). The trial court refused to declare a mistrial. (T. 1428-29). Later that same day, Petitioner's trial counsel renewed his motion for a mistrial based on the alternate jurors' participation in the jury's penalty phase deliberations. The renewed motion was similarly denied. (T. 1433-34).

#### CLAIM XVII.

##### PETITIONER'S CAPITAL SENTENCING JURY WAS PERMITTED TO CONSIDER ONE UNDERLYING FACT AS THE BASIS FOR TWO SEPARATE AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF PETITIONER'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. The trial court instructed the sentencing jury in Petitioner's case that they could find two statutory aggravating circumstances: (1) that the murder was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," (T. 1438, *see* O.C.G.A. § 17-10-30 (b)(7)); and (2) that the murder was "committed while the defendant was engaged in the commission of another capital felony or aggravated battery," (T. 1437, *see* O.C.G.A. § 17-10-30 (b)(2)). The trial court had earlier improperly charged the jury during the guilt phase

of Petitioner's trial with aggravated assault as the underlying felony for felony murder. (T. 1296-97).

3. The two statutory aggravating circumstances were based on the same underlying fact: evidence of an aggravated battery to at least one, if not all three, of the murder victims. The use of the facts of aggravated battery for multiple purposes cannot be squared with double jeopardy, due process, or the prohibition against a mandatory death penalty. The jurors were misled and confused, but the trial court did not clarify the jury charge.

#### CLAIM XVIII.

##### IN CLOSING ARGUMENT, THE PROSECUTOR IMPROPERLY COMMENTED ON PETITIONER'S FAILURE TO BE PRESENT IN THE COURTROOM DURING HIS TRIAL AND EXPRESSED HIS PERSONAL OPINION OF PETITIONER'S RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. In his closing argument, the prosecutor commented upon Petitioner's absence from the courtroom, by remarking on the jurors' opportunity to observe Petitioners' demeanor and expression during the "time you have seen Mr. Lonchar here." (T. 1255). The prosecutor also expressed his personal opinion by telling the jury that the state had placed the burden on their shoulders and there was "only one right thing to do"—to hold Petitioner responsible for the deaths that had occurred. (T. 1259).

## CLAIM XIX.

IN CLOSING ARGUMENT, THE PROSECUTOR IMPROPERLY COMMENTED ON PETITIONER'S FAILURE TO BE PRESENT IN THE COURTROOM DURING HIS TRIAL AND EXPRESSED HIS PERSONAL OPINION OF PETITIONER'S GUILT, IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

1. All other allegations in this petition are incorporated into this claim by specific reference.
2. In his closing argument, the prosecutor commented upon Petitioner's absence from the courtroom, by remarking on the jurors' opportunity to observe Petitioner's demeanor and expression during the "time you have seen Mr. Lonchar here." (T. 1255). The prosecutor also expressed his personal opinion by telling the jury that the state had placed the burden on their shoulders and there was "only one right thing to do"—to hold Petitioner responsible for the deaths that had occurred. (T. 1259).

## CLAIM XX.

THE TRIAL COURT ERRED IN ITS RESPONSE TO A JURY QUESTION ABOUT THEIR INABILITY TO REACH A VERDICT AT THE PENALTY PHASE OF PETITIONER'S TRIAL, IN VIOLATION OF PETITIONER'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

1. All other allegations in this petition are incorporated into this claim by specific reference.
2. After approximately five hours of penalty phase deliberations, Petitioner's sentencing jury sent a written request to the trial court asking for further instruction

should they be unable to reach a unanimous decision. The trial court responded by instructing the jury as follows:

THE COURT: At some point, obviously, if you cannot reach a unanimous decision, you can report that fact to me. But I don't mind telling you the Court doesn't think you have been deliberating long enough yet to be able to make that decision. Certainly, the Court is not at this point prepared to accept a decision and, obviously, a difficult case, as all cases that are required—the Court would just ask you to continue your deliberation.

(T. 1469).

3. Petitioner's trial counsel immediately objected to the court's response, and moved for a mistrial.

MR. LEIPOLD: For the record, I will strongly object to you making any such statement to them, that they couldn't disperse until they reach a decision. I don't think that is appropriate. I think that is coercive at this point in time. I think they can indicate to you they cannot reach a decision and the appropriate action that you should take at that time—the jury has been out five hours already, and I don't think that it is an appropriate thing for you to tell them.

I believe the Court's instruction that you gave the jury is telling them they are going to be here for the rest of the night if they don't make a decision, and I move for a mistrial on the penalty phase at this point.

(T. 1471-73). The trial court denied Petitioner's motion for a mistrial, (T. 1473), and did not reinstruct the jury on this issue.



4. The trial court's initial instructions to the jury prior to penalty phase deliberations made only brief mention that their penalty phase decision must be unanimous. (T. 1446). The court never instructed the jurors at the penalty phase—as the court had at the guilt phase—that they should not surrender an honest opinion to be congenial or to reach a verdict, solely because of the opinions of the other jurors. This omission, combined with the trial court's subsequent instruction that after five hours of deliberation the court would not accept a decision that the jury was deadlocked, created an unduly coercive situation violative of Petitioner's constitutional rights.

#### CLAIM XXI.

THE TRIAL COURT INSTRUCTED THE JURY AT THE GUILT PHASE OF PETITIONER'S TRIAL ON CRIMINAL CONSPIRACY, ALTHOUGH PETITIONER HAD NOT BEEN INDICTED FOR CRIMINAL CONSPIRACY AND THE JURY HAD ALREADY BEEN CHARGED ON PARTIES TO A CRIME, IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. The trial court charged the jury at the guilt phase of Petitioner's trial on the Georgia law of parties to a crime. *See* O.C.G.A. § 16-2-20. The trial court then went on to charge the jury on the law of conspiracy (T. 1298-99; *see* O.C.G.A. § 16-4-8), although Petitioner had not been indicted for criminal conspiracy.

3. The charge on parties to a crime would have properly covered any alleged involvement of a co-defendant

in the crimes with which Petitioner was charged. The additional charge on criminal conspiracy was confusing,<sup>17</sup> improper, and unduly emphasized the nature of Petitioner's participation in the offenses.

#### CLAIM XXII.

BY PEREMPTORILY AND DISCRIMINATORILY EXCUSING FOUR BLACK JURORS, THE PROSECUTOR VIOLATED PETITIONER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

1. All other allegations in this petition are incorporated into this claim by specific reference.

2. The prosecutor peremptorily challenged four black female jurors—Anna Pennyman, Annie Harris, Deirdre Copeland, and Mildred Baker. The prosecutor gave no reason for the excusal of these jurors.

3. The prosecutor's discriminatory excusal of black potential jurors violated Petitioner's constitutional rights to be tried by a jury comprised of a fair cross-section of the community, to reliable fact-finding determinations, and to equal protection, guaranteed by the sixth, eighth, and fourteenth amendments.

#### IV. CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE Petitioner requests that this Court order the following relief:

1. That a stay of execution issue.

<sup>17</sup> The trial court itself expressed concern that the jury would be confused by the charge on criminal conspiracy. The court noted that jurors would not understand whether the charge referred to conspiracy in an "evidentiary" sense or to the "separate crime of conspiracy." (T. 1186-87). Despite these hesitations, the trial court charged the jury on criminal conspiracy. (T. 1298-99).

2. Sufficient time to adequately prepare and present his petition.

3. Permission to timely amend his petition to conform to the evidence adduced by his investigation.

4. Funds for the assistance of investigative and other expert assistance necessary for the preparation and presentation of his petition.

5. Funds to take the depositions of witnesses necessary to his case.

6. Funds to compel the attendance of witnesses, from within and without the State, necessary to his case.

7. The opportunity to present evidence in support of his claims.

8. Relief from his unconstitutional conviction and/or sentence.

/s/ John Matteson  
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Counsel for Mr. Lonchar

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IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

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[Title Omitted in Printing]  
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**MOTION TO RECONSIDER ORDER  
VACATING STAY OF EXECUTION**

Petitioner, Larry Grant Lonchar, by his undersigned counsel, submits this motion to reconsider the Order vacating the stay of execution entered by this Court on June 23, 1995. In support thereof, Petitioner shows the following:

1. On Friday, June 23, 1995, this Court held a hearing at which Petitioner verified his petition for writ of habeas corpus claim by claim, signed the petition in the Court's presence, and asked for a stay of execution to permit the prompt and judicious handling of his petition. 6/23/95 Hrg at 5, 11-15, 17. After reviewing the record of this case, Respondent conceded that Mr. Lonchar had never waived his right to seek a writ of habeas corpus: "I can't [find] any specific waiver on the record in any particular proceeding." *Id.* at 21. The Court granted a temporary stay of execution, and indicated that its only concern was "the timeliness issue." *Id.* at 23.

2. At approximately 9:40 a.m. on Monday, June 26, 1995, Respondent filed a response to Mr. Lonchar's motion for stay of execution, citing to television coverage of the hearing as "evidence" that Mr. Lonchar did not mean what he said when he verified his petition claim by claim, and when he asked for a stay of execution to permit the disposition of the petition. While the media coverage of the hearing raises troubling concerns about the invasion



of confidential attorney-client communications,<sup>1</sup> it also points up the folly of Respondent's reliance upon media coverage as evidence. The content of the confidential communications between Mr. Lonchar and his attorneys is privileged, but Petitioner feels constrained to state that Respondent's suggestion that Mr. Lonchar disputed the allegations of his petition or did not want to pursue them is patently false.

3. On June 26, 1995, before Petitioner had an opportunity to respond to the pleading filed by Respondent that morning, this Court entered orders vacating the stay of execution and denying the civil rights complaint. The Court found that Mr. Lonchar "had not read the Petition for Habeas Corpus and equivocated in adopting the grounds contained therein." Order at 2.<sup>2</sup> In the next sentence, however, the Court found that Mr. Lonchar was "lucid, responsive and direct in his answers." *Id.* The Court went on to find as follows:

It is the opinion of this Court that 'changing methods' is the Petitioner's only true claim.<sup>3</sup>

It is the considered opinion of this Court that said Petition is without merit, not based on his "in court"

<sup>1</sup> This Court failed to comply with the provisions of Superior Court Rule 22 with respect to the approval and monitoring of electronic and photographic coverage of judicial proceedings. As a result, the proceeding deteriorated into a media circus which violated Mr. Lonchar's right to privately consult with counsel and despoiled the "dignity and decorum of the court." Unif. Sup.Ct.R. 22 (L). Such abhorrent and invasive conduct by the media should not be permitted to recur.

<sup>2</sup> The Court refused counsel's request that Mr. Lonchar be given a few minutes to review the documents and refresh his recollection as to their contents. 6/23/95 Hrg. at 4.

<sup>3</sup> The Court disregards Mr. Lonchar's affirmation at the hearing that every claim is true and correct, and that he wishes to pursue every claim. 6/23/95 Hrg. at 5, 11-15, 17; *see also* Exhibit A (attached hereto).

statements and is a product of his counsel's last minute manipulations to avoid execution.

To allow a convicted murderer the latitude of on and off litigation at every whimsical venting of his desire is a travesty of the integrity of the Judicial System and this Court.<sup>4</sup>

Order at 3. The Court concluded: "Therefore, it is ordered and adjudged that this Petition for Habeas Corpus be Dismissed and all relief therein be Denied." *Id.*

This Court Should Reconsider Its Order Vacating the Stay of Execution Because the Court has Misinterpreted and Misconstrued the Record and Misapplied the Law.

4. Two things are clear from the hearing held on June 23, 1995: First, Respondent stated in the hearing that Mr. Lonchar has never been asked to waive, and has never waived, his right to seek a writ of habeas corpus in state court, 6/23/95 Hrg. at 21, and Respondent did not dispute that "Mr. Lonchar does [] have a right to file this petition." *Id.* at 20.

5. Second, Mr. Lonchar verified every claim in his petition and the relief he was requesting, and stated that he wished to pursue every claim in that petition and in the civil rights action which he had also filed, *id.* at 11-15, 17, thereby invoking his rights under the Georgia and United States Constitutions and Georgia law.

6. In vacating the stay of execution, the Court apparently chose to ignore Mr. Lonchar's "lucid, responsive,

<sup>4</sup> To the extent that the Court has ruled that Mr. Lonchar's status as a person convicted of murder deprives him of the right to dismiss his action without prejudice, the Court's ruling violates the equal protection clauses of the Georgia and United States Constitutions because it discriminates without rational basis between Mr. Lonchar and other litigants, and violates Georgia law, which gives every plaintiff the right to dismiss an action without prejudice. *See* O.C.G.A. § 9-11-41(a).

and direct" answers to the Court verifying that he was aware of each of the claims raised in his petition and that he wished to pursue them. *E.g.*, 6/23/95 Hrg. at 11 (Claim 2: "THE COURT: Do you claim that as grounds? You may consult with your attorney. MR. LONCHAR: Yes, sir."); *id.* at 12 (Claim 3: "THE COURT: Do [you] claim that you were incompetent at the time you were convicted? MR. LONCHAR: Yes, sir."; Claim 4: "MR. LONCHAR: Yes, sir."; Claim 5: "THE COURT: Do you adopt that? MR. LONCHAR: Yes, sir."; Claim 6: "THE COURT: Do you adopt that? MR. LONCHAR: Yes, sir."); *id.* at 13 ("THE COURT: Do you adopt that? MR. LONCHAR: Yes, sir."); *id.* at 14 (Claim 9: "THE COURT: Do you adopt that? MR. LONCHAR: Yes, sir."; Claim 10: "THE COURT: Do you adopt that one? MR. LONCHAR: Yes, sir."; Claim 11: "THE COURT: Do you adopt that? MR. LONCHAR: Yes, sir."; Claim 12: "THE COURT: I assume you have already said you adopt that? MR. LONCHAR: Yes, sir."); *id.* at 15 (Claims 13-22 "THE COURT: "Now are these your claims in this case, Mr. Lonchar? MR. LONCHAR: Yes, sir."); *id.* ("THE COURT: Have you signed this verification of this petition for habeas corpus verifying that the facts are true and correct? MR. LONCHAR: Yes, sir.").

7. The Court apparently chose to adopt Respondent's argument that the Court should impose a present waiver of state postconviction remedies based upon speculation as to a possible future waiver, and ignored Respondent's admission at the hearing that Mr. Lonchar has not waived his rights to seek habeas relief. This ruling is clearly erroneous because Mr. Lonchar's statements with respect to what he may or may not do in eight or nine months could not possibly constitute a present waiver of his statutory and constitutional rights.<sup>5</sup> The simple fact is

<sup>5</sup> The right to seek a writ of habeas corpus is grounded in the Georgia Constitution and Georgia law. Article I, § 1, ¶ 15 provides that "[t]he writ of habeas corpus shall not be suspended." Article

that Mr. Lonchar has *invoked* his right to seek habeas corpus relief, not waived it.

8. While Petitioner submits that the record from the hearing is clear on this point, Mr. Lonchar has provided the attached re-affirmation of his intention to pursue the claims presented in his civil rights action and in his habeas action, and that he seeks the relief requested in those acitons. *See* Exhibit 'A'. That being the case, Mr. Lonchar is entitled to a stay of execution to permit the orderly handling of his habeas corpus petition, just as any other inmate would be.<sup>6</sup>

WHEREFORE, Petitioner respectfully prays that the Court reconsider its June 26, 1995 Order and grant an indefinite stay of execution to permit him to pursue the claims for relief presented in his habeas petition.

Respectfully submitted,

/s/ Clive Stafford Smith  
CLIVE STAFFORD SMITH  
210 Baronne Street  
Suite 1320  
New Orleans, LA 70112  
(504) 558-9867

I, § 1, ¶ 12 provides that "[n]o person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state." O.C.G.A. § 9-14-41 *et seq.*, provides the statutory framework for the implementation of the constitutional rights.

<sup>6</sup> While Respondent argued that Mr. Lonchar does not have "clean hands" in this matter, it is Respondent who has changed his tune since the hearing on June 23, 1995. At the hearing, Respondent argued that Mr. Lonchar has not waived his right to state post-conviction remedies and that there is no impediment to a stay of execution. In his response, Respondent argued that Mr. Lonchar's references to a possible future waiver should be treated as a present waiver, and that no stay of execution should enter because of this presumptuous and speculative future waiver.



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Attorneys for Petitioner

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## EXHIBIT A

6-26-95

I, Larry Grant Lonchar, intend to pursue the claims  
for relief asserted in both my § 1983 civil rights petition  
and my habeas petition as filed on 6-23-95.

/s/ Larry G. Lonchar  
LARRY G. LONCHAR  
EF209811 G-2-32  
GD&CC  
P.O. Box 3877  
Jackson, GA 30233

[Notary Omitted in Printing]

IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

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[Title Omitted in Printing]

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**MOTION FOR RECONSIDERATION**

Plaintiff, Larry Grant Lonchar, by his undersigned counsel, submits this Motion for Reconsideration from the denial of his Civil Rights Complaint challenging death by Electrocution as the only form of execution available in this state.

1. On June 26, 1995, this Court entered an order denying Plaintiff's complaint, asserting that it failed to state a claim for which relief can be granted. Plaintiff requests that the Court reconsider its denial for three reasons:

2. First, Plaintiff's Civil Rights Complaint is properly before this court. According to the Supreme Court of Georgia, 42 U.S.C. § 1983 creates "a cause of action, cognizable in the courts of this state." *City of Cave Spring v. Mason*, 252 Ga. 3, 310 S.E.2d 892, 893 (1984).

3. Second, the relief requested in Plaintiff's Civil Rights Complaint is appropriately secured by 42 U.S.C. § 1983, as it is a complaint for declaratory and injunctive relief, as well as for monetary damages. The language of 42 U.S.C. § 1983 is quite broad in the types of suits it permits. The statute allows relief to be sought by an injured party "in an action at law, suit in equity, or other proper proceeding for redress." *Id.* In his Complaint, Plaintiff requests:

a) That a stay of execution issue;

b) The opportunity to present evidence in support of his claims; and

c) Relief from his unconstitutional sentence of death by electrocution.

All three of these requests fit well within the purview of relief permitted under the statute.

4. Third, Plaintiff's Civil Rights Complaint is meritorious. Plaintiff has the right to humane and decent treatment, even in his execution. Under our own constitution, someone in Plaintiff's position not only has the constitutional right to object where "cruel and unusual punishments [are] inflicted," but Plaintiff also has the right not to "be abused . . . while . . . in prison." *Ga. Const. Art. 1, § 1, ¶ 17.*

5. In this case, if Plaintiff is to be executed, and there is no reason to believe he will be given the meritorious claims in his Petition for Writ of Habeas Corpus, he has a strong philosophical and moral desire to provide something back to society by donating his organs to science. As with every other human being in this State, Plaintiff has "the natural and inalienable right to worship God, each according to the dictates of that person's own conscience." *Ga. Const. Art. 1, § 1, ¶ 3.*

6. There is no reason to destroy Plaintiff's ability to help society at the same time as he forfeits his life. Indeed, there is another violation of the Georgia Constitution, since "Government is instituted for the protection, security and benefit of the people." *Ga. Const. Art. 1, § 1, ¶ 2* (emphasis supplied). To destroy Plaintiff's ability to benefit society is, in this context, senseless, purposeless and unconstitutional.

WHEREFORE, Plaintiff respectfully prays that the Court reconsider its denial of his Civil Rights Complaint and grant him an indefinite stay of execution to permit him to pursue the complaint and the relief requested.



Respectfully submitted,

/s/ Clive Stafford Smith  
 CLIVE STAFFORD SMITH  
 210 Baronne Street  
 Suite 1320  
 New Orleans, LA 70112  
 (504) 558-9867  
 JOHN MATTESON  
 Georgia Bar No. 477137  
 230 Peachtree Street  
 Suite 900  
 Atlanta, GA 30303  
 (404) 584-0872  
 Attorneys for Petitioner

[Certificate of Service Omitted in Printing]

EXHIBIT A

6-26-95

I, Larry Grant Lonchar, intend to pursue the claims for relief asserted in both my § 1983 civil rights petition and my habeas petition as filed on 6-23-95.

/s/ Larry G. Lonchar  
 LARRY G. LONCHAR  
 EF 209811 G-2-32  
 GD & CC  
 P.O. Box 3877  
 Jackson, GA 30233

[Notary Omitted in Printing]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 95-8821

---

LARRY GRANT LONCHAR,  
*Petitioner/Appellee,*

v.

ALBERT G. THOMAS, Warden, Georgia Diagnostic and  
Classification Center,  
*Respondent/Appellant.*

---

EMERGENCY MOTION TO VACATE  
STAY OF EXECUTION

---

Please serve:

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Senior Assistant  
Attorney General

No. 95-8821

---

LARRY GRANT LONCHAR

v.

A. G. THOMAS, Warden

---

CERTIFICATE OF INTERESTED PERSONS

Respondent/Appellant certifies that the following persons are "interested persons" in this appeal from the denial of habeas corpus relief under 28 U.S.C. § 2254:

Camp, Honorable Jack T., United States District Judge

Castellani, Honorable Robert J., trial judge

Connelly, Honorable Kristina Cook, state habeas judge on next friend petition

Matteson, John, counsel for Petitioner

Morgan, J. Tom, district attorney

Smith, Charles Wayne, victim (deceased)

Smith, Honorable E. Byron, state habeas corpus judge

Smith, Richard, aggravated assault victim

Smith, Steven, victim (deceased)

Stafford Smith, Clive, counsel for Petitioner

Sweat, Margaret, victim (deceased)

Westmoreland, Mary Beth, counsel for Respondent



IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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No.

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LARRY GRANT LONCHAR,  
*Petitioner/Appellee,*

v.

ALBERT G. THOMAS, Warden, Georgia Diagnostic and  
Classification Center,  
*Respondent/Appellant.*

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EMERGENCY MOTION TO VACATE  
STAY OF EXECUTION

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Comes now Albert G. Thomas, Warden, Respondent/Appellant in the above-styled case, and makes this his emergency motion to vacate the stay of execution entered by the district court in Petitioner's federal habeas corpus case on June 28, 1995, by showing and stating as follows:

This Court has just recently reviewed this action; therefore, Respondent will not repeat the statement of the case except for events occurring after this Court's last ruling on Friday, June 23, 1995 and two addition dates that have since been mentioned in other proceedings.

April 16, 1995—Petitioner Larry Lonchar signed a motion to be substituted as a plaintiff in a civil rights

action challenging the method of execution in *Nicholas Ingram and Larry Grant Lonchar v. Ault*, no. 1:95-cv-875-HTW.

June 3, 1995—The district court denied the motion to substitute parties.

June 23, 1995—The United States Supreme Court denied a stay of execution and dismissed a petition for writ of certiorari for lack of jurisdiction which had sought to challenge the dismissal of the next friend state habeas corpus petition filed by Milan Lonchar.

June 23, 1995—Counsel for Respondent received a civil rights complaint filed in the Superior Court of Butts County seeking only to challenge the method of execution, filed by Mr. Matteson and signed by Mr. Lonchar.

June 23, 1995—Between 10:30 a.m. and 11:00 a.m., counsel received telephonic notice that Mr. Lonchar had "consented" to a state habeas corpus petition being filed and that a hearing was to be held later that day at 1:00 p.m. in Butts County. Counsel did not receive a copy of the petition until obtaining one from the warden immediately before the hearing began. Counsel had received a copy of an unsigned petition earlier in the morning but was not advised that petition was being filed or that Mr. Lonchar had agreed to that petition. At that hearing, although stating that he was adopting the allegations of the petition, Mr. Lonchar continually stated that he only wanted to have time to see if the General Assembly would change the method of execution. The court entered a temporary stay, indicating a ruling would be forthcoming the next week, before the execution window expired.

June 26, 1995—The Superior Court of Butts County entered an order denying the stay of execution and dismissing the habeas corpus petitions.

June 26, 1995—At approximately 3:45 p.m. the Superior Court of Butts County denied the civil rights complaint for failure to state a claim upon which relief could be granted.

June 27, 1995—At approximately 9:30 a.m. counsel for Respondent received Petitioner's motions for reconsideration from the orders vacating the stay of execution, dismissing the habeas corpus petitions and denying the civil rights complaint. Respondent filed a response to the motion in the habeas corpus actions.

June 27, 1995—The Superior Court of Butts County denied the motion for reconsideration.

June 27, 1995—Mr. Lonchar filed a motion for stay of execution and application for certificate of probable cause to appeal in the Supreme Court of Georgia. Late that afternoon, the Court denied probable cause to appeal and the motion for stay of execution as well as the earlier filed emergency motion for stay.

June 27, 1995—Counsel was served with a federal habeas corpus petition signed by Mr. Lonchar at 7:25 p.m.

June 28, 1995—Larry Lonchar's federal habeas corpus petition was filed in the United States District Court. Respondent filed a response in opposition to the motion to stay and a motion to dismiss due to Petitioner's abusive conduct. The district court held a hearing shortly after 11:00 a.m. and gave the Petitioner an opportunity to respond to the allegations of abuse and heard testimony from Mr. Lonchar and Clive Stafford Smith. The court also received supplemental briefs from both parties that afternoon. At approximately 9:40 p.m. the district court entered an order denying the motion to dismiss and granting the motion for stay of execution.

#### The Stay Should be Vacated

Respondent submits this Court should vacate the stay of execution entered by the district court and conclude that Petitioner, through his abusive conduct, has dis-entitled himself to relief in this Court.

Respondent moved to dismiss the petition, not under the principles of Rule 9(b) or Rule 9(a), but based on the equitable principles governing habeas corpus actions. The courts have long recognized the equitable nature of habeas corpus proceedings and the consideration of a petitioner's conduct in determining whether habeas corpus relief is appropriate.

Because the writ of habeas corpus is equitable in origins, under certain circumstances a court may decline to entertain a petition properly within its jurisdiction. [Footnote omitted.] The focus of the court's inquiry in making this threshold determination is on the conduct of the habeas petitioner, because "a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Sanders v. United States*, 373 U.S. 1, 17, 83 S.Ct. 1068, 1078, 10 L.Ed.2d 148 (1963) (quoting *Fay v. Noia*, 372 U.S. 391, 438, 83 S.Ct. 822, 849, 9 L.Ed.2d 837 (1963)).

*Gunn v. Newsome*, 881 F.2d 949, 954-5 (11th Cir. 1989) (en banc). Furthermore, even prior to the abuse of the writ analysis of *McCleskey v. Zant*, — U.S. —, 111 S.Ct. 1454 (1991), the courts held that "Intentional abandonment of a claim is precisely the context that application of the concept of abuse of the writ is intended to address. . . . Petitioner may be deemed to have waived his right to a hearing on a successive application for federal habeas relief when he deliberately abandons one of his grounds at the first hearing." *Darden v. Dugger*, 825 F.2d 287, 294 (11th Cir. 1987). Similarly, federal courts have consistently refused to "tolerate needless piecemeal litigation, or . . . [to] entertain collateral proceedings whose only purpose is to vex, harass, or delay." *Sanders*, 373 U.S. at 18, quoted in *Darden v. Dugger*, 825 F.2d at 294.

In *Thigpen v. Smith*, 792 F.2d 1507, 1512 (11th Cir. 1986), the Court specifically noted "the degree to which



the parties in this case have subverted the usual judicial processes for adjudicating collateral attacks of state court convictions and sentences pursuant to 28 U.S.C. § 2254 (1982).” The Court focused on the history of Rule 9(b) addressing successive petitions and the concern about the increasing number of petitions filed in federal court by state prisoners as well as the protection of the courts and the State from “expensive and time-consuming litigation.” *Id.* at 1514.

The Rule facilitates the preservation of evidence, for were it not enforced, the State would be required to preserve all relevant evidence until the time, after several possible petitions, when the claim to which that evidence relates is eventually raised. Of course, evidence is by its nature, fragile and susceptible to destruction over time, as memories fade and witnesses die or become otherwise unavailable.

*Id.* at 1514.

More recently, the Supreme Court has focused on the equitable nature of habeas corpus.

Whether his claim is framed as a habeas petition or § 1983 action, Harris seeks an equitable remedy. Equity must take into consideration the State’s strong interest in proceeding with its judgment and Harris’ obvious attempt at manipulation. . . . This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.

*Gomez v. United States District Court*, — U.S. —, 112 S.Ct. 1652, 1653 (1992).

Although this case does not present the traditional example of “abuse of the writ” seen by this Court in capital

cases, the conduct of Petitioner is, nonetheless, abusive. Respondent acknowledges Petitioner has not had a federal court review the merits of the issues presented herein; however, that is not due to a lack of opportunity, but Petitioner’s failure to participate in the judicial process and his waiver of his right to seek federal habeas corpus review. Respondent further acknowledges that counsel know of no case directly on point that has applied these principles to the “first” petition consented to by a petitioner; however, no case cited by Petitioner or the court below has faced the same procedural history or the same factual situation presented herein.

In the interests of brevity, Respondent would incorporate by reference the arguments made in the pleadings in the district court and at the hearing before that court. Certain findings by the district court are set forth below which are pertinent to this Court’s review:

1. “Larry Lonchar is aware of the prior history of this litigation which is detailed in the Statement of the Case.” (Order at 5).

2. “Lonchar was aware of the availability of habeas corpus relief during this entire period and had discussed it with his attorney. Lonchar offered no reason for his failure to pursue review of his sentence except that he chose not to do so. He was aware of the potential legal arguments and their factual predicates.”

3. Petitioner “on at least three occasions [] knowingly and voluntarily waived further review of his sentence in open court.” (Order at 6).

4. Petitioner’s “purpose in asserting the claims is not to obtain a review of the constitutionality and possible errors in his sentence. His sole purpose in asserting the claims is to delay his execution so that the method of execution may be chanted to allow him to donate his organs upon death.” (Order at 7).

5. "[D]espite 8 years of litigation over these claims, and numerous opportunities to join in the litigation, Lonchar has explicitly refused to bring these claims. In fact, the first next-friend petition, the Court found that Lonchar made a voluntary and knowing waiver of his right to appeal on the claims." (Order at 9).

6. The state's assertion that the claims were brought solely for the purpose of delay "is supported by Lonchar's own testimony at the evidentiary hearing conducted in this case." (Order at 9).

7. "Lonchar fails to come forward with either objective or subjective reasons to excuse the conduct." The reason offered by Petitioner "is not sufficient reason for failing to raise these issues when he previously had the opportunity to do so. Lonchar's failure to raise these issues earlier is certainly inexcusable negligence, if not abandonment." (Order at 9, 10).

Finally, the court found that Petitioner's conduct would constitute an abuse of the writ except the court "feels constrained" to deny the motion to dismiss, finding no authority for the application of the abuse of the writ doctrine in a first petition. (Order at 11-12).

Respondent submits that, in spite of the unavailability of a case directly on point, the law governing abuse of the writ has developed through principles of equity which are equally applicable in first or successive petitions. The cases in this Court where the abuse doctrine has not been applied in a first petition do not have the same factors present and do not have the same factual findings to support the finding of abuse. Specifically, the district court cited this Court's holding in *Davis v. Dugger*, 829 F.2d 1513 (11th Cir. 1987). In that case, the court noted that the district court's order was "ambiguous" but found that dismissal was not warranted under either Rule 9(b) or 9(a). The court had before it a petition which the state sought to dismiss, not due to the years of delay and the continuous refusal to participate in ongoing litigation,

but one in which the "delay" was comparatively short and there was no lack of diligence. The primary basis for the decision was Rule 9(a). Further, in referring to *Davis* subsequently, this Court citing it for the holding, "the scheduling of an execution does not, in and of itself, create a basis for dismissing a petition under the abuse of the writ doctrine." *Bundy v. Dugger*, 850 F.2d 1402, 1407, n.3 (11th Cir. 1988). In that case, the court noted, "even assuming *arguendo* that a first petition could be dismissed as an abuse of the writ because it was filed on the eve of execution, this case does not present an abusive situation." *Id.* at 1407.

Respondent does not argue that the only abuse in the instant case is the fact that the petition was filed on the eve of execution, but relies upon all of the factors presented to and found by the district court, particularly, Petitioner's prior waivers, his express refusal to participate in litigation for years, even sitting through a three day district court evidentiary hearing on his competency and refusing to participate in the habeas corpus action, Petitioner's stated purpose for this proceeding, that is delay, and the otherwise abusive conduct in this case. If equity applies in § 2254 cases, then equitable principles surely must weigh heavily against the Petitioner. Respondent submits that when equity is the underlying premise for the abuse of the writ doctrine, no logical reason exists for not considering the suitor's conduct even in what is technically a "first" petition. (It should be noted that this is certainly not the first petition seeking to challenge the Petitioner's convictions and sentences and is in fact the third such petition. It is simply the first that Petitioner has signed.)

Although Respondent raised laches below to avoid waiving that defense should particularized prejudice become apparent in addressing the merits of any issues, the Rules Governing Section 2254 Cases were not the basis for Respondent's argument. Respondent does not assert



that he has shown particularized prejudice, but that the delay should be considered in evaluating the equities in this case.

Respondent also has not relied on Rule 9(b), but again, on the equitable principles cited by the district court and in the pleadings below. If equity requires consideration of a suitor's conduct, that conduct should be considered regardless of whether it is a first or successive petition. Cases can be dismissed when it is a petitioner's first petition due to laches, procedural default, or other conduct attributable to the petitioner. The logical conclusion, then, is that a case can be dismissed due to the petitioner's conduct under the circumstances of this case.

In *McCleskey v. Zant*, the Court examined the history of the Great Writ and the development of the abuse of the writ doctrine, noting, "the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." 111 S.Ct. at 1467. The Court recognized that abuse of the writ was not limited to "deliberate abandonment," although that would be one form of abuse. The Court also recognized the heavy costs "on scarce federal judicial resources" and that "habeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh." *Id.*, 111 S.Ct. at 1469.

Respondent recognizes that in this case, the Petitioner, Larry Lonchar, has not had his own federal habeas corpus petition adjudicated "on the merits"; however, the abuse of the writ principles, particularly the focus on equity, should still apply. This Court has held, "The law does not guarantee every habeas petitioner at least one bite of the merits apple. Stated another way, it is not a prerequisite to application of the abuse of the writ doctrine that the petitioner have had a prior petition adjudicated

on the merits instead of having had it denied or dismissed on procedural default grounds." *Macklin v. Singletary*, 24 F.3d 1307, 1314 (11th Cir. 1994).

Petitioner Larry Lonchar's conduct is equally as abusive as that of McCleskey or Macklin. The district court's findings of fact fully support that conclusion. Therefore, Respondent submits there is no reason not to apply equitable principles to conclude that due to the Petitioner's abusive conduct, including delay and waiver, the clear finding by the district court that the only purpose of this proceeding is delay so that attempts could be made to change the method of execution in Georgia, he should not now be allowed to file this federal habeas corpus petition raising issues which admittedly could have been raised years earlier and that, therefore, the district court should have dismissed the petition and denied the stay of execution.

#### CONCLUSION

WHEREFORE, Respondent prays that this Court vacate the stay of execution entered by the district court and conclude that due to the Petitioner's abusive conduct, he has "disentitled himself" to the relief he now seeks.

Respectfully submitted,

MICHAEL J. BOWERS 071650  
Attorney General

/s/ Susan V. Boleyn  
SUSAN V. BOLEYN 065850  
Senior Assistant Attorney General

/s/ Mary Beth Westmoreland  
MARY BETH WESTMORELAND 750150  
Senior Assistant Attorney General

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

CIVIL ACTION No. \_\_\_\_\_

HABEAS CORPUS  
28 U.S.C. § 2254

LARRY GRANT LONCHAR,  
v. *Petitioner,*  
A. G. THOMAS, Warden,  
*Respondent.*

MOTION TO DISMISS FOR ABUSIVE CONDUCT,  
BRIEF IN SUPPORT,  
AND RESPONSE TO MOTION TO STAY

COMES NOW A. G. Thomas, Warden, Respondent in the above-styled action, by counsel, and submits the instant motion to dismiss this petition for a writ of habeas corpus based upon Petitioner's abusive conduct, brief in support and response in opposition to the motion for stay of execution. In the interest of time, Respondent is not filing separate documents and prays that this Court allow the responses and motion to dismiss to be consolidated. For the reasons set forth below, Respondent submits this Court should deny the motion for stay of execution and dismiss the petition due to the Petitioner's abusive conduct in federal and state court.

STATEMENT OF THE CASE

As this Court has just reviewed a next friend petition with a detailed statement of the case, Respondent will not repeat

\* \* \* \*

undermine the ruling of the court that on June 23, 1995, and when the court ruled, Mr. Lonchar was not seeking to litigate habeas corpus issues.

Respondent thus submits that Petitioner's conduct in that proceeding, and on direct appeal, operates, at least, as a procedural default, and even a deliberate bypass of state procedures. Therefore, at least those claims which were not timely raised at trial and on appeal are procedurally defaulted.

D. Delay

Respondent finally raises a defense of delay or laches to this action. Although Rule 9(a) contemplates a showing of prejudice by a respondent, the equitable nature of habeas corpus should allow the applicability of traditional laches principles. Clearly, Petitioner could have filed this action at least at the time the first next friend petition was filed in this Court in 1991. As the merits of the petition are not being reached at this time, or at least no evidentiary hearing is set, and due to the dilatory filing of this petition by Mr. Lonchar in relation to the scheduled execution, Respondent does not have information to make the showing of prejudice. If this Court were to conduct a hearing on the merits of any issues raised or to proceed further with the merits of the issues, Respondent would request an opportunity to establish prejudice under Rule 9(a).

E. Conclusion

Respondent submits that this Court should find that Petitioner has engaged in abusive conduct in numerous ways and that he is not entitled to the equitable relief contemplated by habeas corpus. To allow Mr. Lonchar to refuse to participate in not one, but two, next friend federal habeas corpus actions and two next friend state habeas corpus actions and to dismiss yet another state habeas corpus action, even though without prejudice, and



then, on the eve of his execution, to finally decide to participate in a federal petition countenances abuse and encourages manipulation of the judicial process. By refusing to file petitions and, instead, having next friend actions litigated, Mr. Lonchar has accomplished the goal of most death row inmates—delay. It has now been eight years since Mr. Lonchar's conviction and sentence were affirmed on direct appeal and he would now have this Court rule he may just now begin the federal habeas corpus process. Respondent prays that this Court not allow such abuse.

\* \* \* \*

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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[Title Omitted in Printing]

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**SUPPLEMENTAL BRIEF IN SUPPORT OF  
RESPONDENT'S MOTION TO DISMISS**

COMES NOW A. G. Thomas, Warden, Respondent in the above-styled action, by counsel, and submits the instant supplemental brief in support of the motion to dismiss. This brief is specifically based on matters discussed at the hearing before this Court this morning.

First of all, Respondent attaches hereto as exhibits for this Court's consideration the "Motion to Substitute of Join Parties" filed by Clive Stafford Smith on behalf of Larry Lonchar in the case of *Nicholas Lee Ingram and Larry Grant Lonchar v. Ault*, no. 1:95-cv-875-HTW. This is the civil rights action referred to by Mr. Stafford Smith in which he noted the substitution of Mr. Lonchar as a party in the proceeding challenging the method of execution in the state of Georgia. (Respondent's Exhibit No. 1). That motion is dated April 16, 1995. As seen from Respondent's Exhibit No. 2, the court denied the motion to substitute on June 1, 1995, finding that cited to its prior procedural default cases, noting that cause requires a showing that "some objective factor external to the defense impeded counsel's efforts" to timely raise the claim. *Id.*, citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Objective factors would include "interference by state officials making compliance with the state procedural rule impracticable" and a "showing that a factual or legal basis for a claim was not reasonably available to counsel." *Id.* The Court went on to empha-

size, "Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse the procedural default." *Murray v. Carrier* at 486-8; *McCleskey* at 1470. Furthermore, once a showing of cause has been made, a petitioner must establish "actual prejudice" resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 168 (1982); *McCleskey* at 1470.

Thus, Respondent submits this Court does not have to find the knowing and voluntary waiver or intentional abandonment discussed in *Potts* in order to find that Petitioner has engaged in conduct which "disentitles" him to relief, but that the court should focus on objective factors, including the facts that Petitioner has refused to participate in two separate federal habeas corpus petitions, for whatever reasons, and that nothing has been presented in this Court which could not have been raised in either of the earlier proceedings. In fact, Petitioner was taking action to challenge the method of execution two months before the most recent next friend federal petition was filed.

Therefore, Respondent again urges this Court to conclude that Petitioner has engaged in abusive conduct. Mr. Lonchar's motivation is not the controlling factor under the objective standard of *McCleskey*. The facts are apparent from the record now before this Court—he was aware of his rights, had discussed the issues with counsel and could have raised these claims at the time the next friend petitions were filed.

IN THE SUPERIOR COURT FOR THE COUNTY  
OF DEKALB, STATE OF GEORGIA  
JANUARY TERM, 1987

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Indictment No. 86-CR-3747

IN CHAMBERS

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STATE OF GEORGIA

v.

LARRY GRANT LONCHAR and  
MITCHELL WILLARD WELLS

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Tried Before His Honor,  
Judge Robert J. Castellani,  
Without a Jury on  
February 27, 1987

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TRANSCRIPT OF EVIDENCE

[2] (The following occurred in chambers:)

MR. LEIPOLD: I asked you to come in camera and I ask the record be sealed with reference to these matters.

THE COURT: I have already told my court reporter.

MR. LEIPOLD: First of all, I need to make a short record here:

I have been practicing for approximately 15 years. I was with the District Attorney's Office about six years.



I have handled a number of criminal cases, as the Court is aware, a large number.

I have been in the posture where, until yesterday, my client has declined to discuss this case with me, any of the facts surrounding this case. Now, until then, my position this morning was I was going to ask to come in, in camera, and ask you to appoint someone else or consider appointing someone else or allow me to withdraw, or do something, because—just to see if there was a problem in communication. That changed as of yesterday and I know longer make that motion. I am not asking to come out of the case. I am in the case and I will stay [3] in the case.

But I am saying to you that because of that situation we are in a posture of where we are not overly prepared to respond to this situation. I have been in a position where, really, the only thing I have been able to find out about this case has come from the District Attorney. I may have to, for that reason, move for continuance and refer back to this particular conference, and if that happens I would ask the Court simply to note what I am saying here today. I never had this happen before and I really don't know how to deal with it, but that is the position that I am in, until yesterday, and yesterday was the first time that we have discussed the circumstances at all. Before then my client declined to discuss the matter with me.

THE COURT: Let me ask, is there some reason why you were not cooperating with your attorney?

MR. LEIPOLD: Wait. There is a reason, and I don't want him to respond to that. He has told me the reason. I don't feel it appropriate for him to tell you that reason. When this is [4] over I will be glad to explain that but—

THE COURT: I was going to let him know that he has the right to have assistance of counsel.

MR. LEIPOLD: Right.

THE COURT: He has the right to have an attorney appointed, if he can't afford an attorney. He does not

have a right to choose what attorney that he is going to have to represent him.

MR. LEIPOLD: Let me amplify briefly, on the record. It is not a situation where Mr. Lonchar is saying that he does not like me, he does not want to talk with me or that we are having a personal dispute—and, Mr. Lonchar, the only response I'd like for you to make, if I am accurate, as to that, is that a yes or no to that?

MR. LONCHAR: (Defendant nods head up and down).

MR. LEIPOLD: Yes, was the response, that is not the reason.

THE COURT: And the other thing I want to let you know, you don't continue cases or don't get extensions of time by failing to [5] cooperate.

MR. LEIPOLD: I understand that.

THE COURT: I thought I had given you gentlemen every possible extension and every—I haven't tried to rush this through, but at the same time we need to be prompt about it, and I can't just allow a defendant to say, well, I don't think I will cooperate with my attorney and maybe the case will never come to trial. He has to understand the case is coming to trial, he either cooperates with his counsel and gets prepared or he makes a choice not to cooperate.

MR. LEIPOLD: That is really exactly the opposite of this posture which, again, I don't think is appropriate to go into, but that is not the reason. He is not trying to get a continuance, and I will state that in my place—well, I don't think I should go any further on that. I wanted that on the record.

Now, if I can move to number two. We have a motion for funds, for assistance of moneys, and I wondered if you want me to amplify on that? Now, I don't think that it is appropriate doing that with the State here.

THE COURT: I was going to excuse the [6] State when it came time to decide that. Today I was just trying to get through the evidentiary issues because I need to

know what the issues are. I need to know what the issues are as to what you need funds for. I have got to make decisions as to whether or not he needs the support and what areas and what it is going to cost. So, before you come in and ask me I'd like for you to have some idea, who you want and what you need him for and how much is it going to cost.

MR. LEIPOLD: I will tell you right now.

THE COURT: Sure.

MR. LEIPOLD: I need a psychiatrist, who is already working in this case, who we already used, who I'd like to continue to be able to employ. The public defender, frankly, assisted with some emergency funds that they had early-on in this case. I probably need, my estimate, something in the area of two thousand dollars. And that is a rough estimate. Okay?

Second, I would like an investigator. I would limit that, and I would suggest, something in the neighborhood of 15 hundred [7] dollars. That is usually what I ask clients to set aside for an investigator. It would probably be more in this case. I think I could find somebody who will work if he knew that commitment was there and not worry about anything in the case.

And then I'd like access to—and noting this record is sealed—I'd like access to a polygraph operator. I have someone who is available and his standard rate for performing tests is \$300.00. Now, I have not often had to use situations were he had to go to the DeKalb County Jail. I assume it might be a little bit more. I wouldn't think much more.

Those are the three areas that I am asking for right now, not asking at this point in time for blood experts or ballistics because I don't know everything about that yet, but those are my areas of concern.

THE COURT: Who is the psychiatrist?

MR. LEIPOLD: We don't have the written reports back yet from the doctor. I will bring you preliminary written reports from him and show you what his billings

are to date and update you, as long as that, again, can be sealed [8] in camera, if that is acceptable.

THE COURT: Sure. Of course, I don't expect you to divulge anything to defense counsel that you don't think appropriate.

MR. LEIPOLD: Okay. Polygraph operator is Walter Maddox. I have used him a number of times. The investigator, I will probably use Rick Skinner, who is a local private investigator.

THE COURT: Your looking at under four thousand dollars?

MR. LEIPOLD: Looking at about—yes, almost exactly.

THE COURT: I will have to see what funds are available, and I assume there is something that I can do to make those available and I will just have to—I can get it from you later on if I have to, the names and whatever else is necessary. I have to make commitments but I should be able to. Let me check on the funds—

MR. LEIPOLD: Okay.

THE COURT: —and see what is available. I would assume there won't be any problem.

[9] MR. LEIPOLD: That is all I have. Thank you.

(End of proceedings in Chambers)



IN THE SUPERIOR COURT OF DEKALB COUNTY  
STATE OF GEORGIA

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[Title Omitted in Printing]

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Tried Before His Honor,  
Judge Robert J. Castellani,  
With a Jury on  
June 22, 23, 24, 25, 26, & 27, 1987

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TRANSCRIPT OF EVIDENCE

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[54] MR. PETREY: If it will make Mr. Leipold feel any better, we have already decided which people we are going to examine.

THE COURT: Just remember the first one that speaks. You can decide.

MR. LEIPOLD: Now, we have a matter that is a little bit different. Mr. Lonchar has asked me to make a request of the Court, and he is quite serious about this. Mr. Lonchar does not wish to remain in court during the conduct of this trial. And in saying that Mr. Lonchar has advised me that he understands that there will be times when his presence will be required, when people are needed to point him out or make an identification of him. He is an intelligent person. He has admitted to me at that point he knows that he will have to come [55] into the courtroom. He has stated to me that he does not wish to remain in this court room during the trial of this case, that he wants to be removed during the trial of this case.

I have taken strong issue with that—that is all I will say at this point in time—and advised him to the contrary as to that. And I really don't know what to say at this point, Your Honor. That is his position. He does not want to participate or be present during the conduct of the trial. He can speak on that as well as I can at this point in time, if he wants to address you.

THE COURT: Let me hear from the prosecutor, what their position is.

MR. PETREY: Your Honor, we would like that he be here for the entirety of the voir dire and all preliminary matters such that. Jurors sometimes will recall instances of seeing that person, now that they have sat here. After such time as the case begins we would not be opposed to his absenting himself as long as the State would have the right to recall him to be present in the courtroom during such time as we feel his presence will be necessary. Obviously, [56] there are many issues of identification.

THE COURT: If he doesn't want to be here during the trial—I assume he is going to be here during the voir dire when we have the voir dire selection?

MR. LEIPOLD: That is what he has advised me, Your Honor.

THE COURT: Well, Mr. Lonchar, let me ask you whether or not you have heard what your attorney had to say, is that correct?

MR. LONCHAR: Yes, sir.

THE COURT: Is there anything else that you want to add to that—

MR. LONCHAR: No, sir.

THE COURT: —as to your attorney's request?

How about the voir dire? I think he ought to be here for the voir dire, but I will be glad to hear from you about that.

MR. LEIPOLD: Let's be sure the record is clear, because of the way you just phrased that perhaps it is not clear. This is not his attorney's request, you—

THE COURT: I understand that.

MR. LEIPOLD: You said as to his [57] attorney's request.

THE COURT: It could have been phrased—

MR. LEIPOLD: This is my client's position, it is not my request.

THE COURT: All right. You have discussed it with your client?

MR. LEIPOLD: I have.

THE COURT: Does he have any objection to being here during voir dire?

MR. LEIPOLD: We did not discuss that in detail. That would be during the questioning of the jury? He will remain during that.

MR. LONCHAR: If I have to.

MR. LEIPOLD: Yes.

THE COURT: I want him here for that. I probably would go along with his request so long as he understands there are certain parts of the case where he'd have to be here for the purposes of identification. If that is his request, it is contrary to your instructions, Mr. Leipold—I assume you have instructed him otherwise and he has made a decision about that.

Mr. Lonchar, do you understand your attorney is advising you not to remove yourself [58] from the courtroom during the trial of the case? Did you understand that, Mr. Lonchar?

MR. LONCHAR: Yes, sir.

THE COURT: And you say that for your own reasons you want to remove yourself from the trial?

MR. LONCHAR: Yes, sir.

THE COURT: Well, I am going to ask that you all leave, the District Attorney's office, the prosecutor.

MR. PETREY: May I bring one thing to your attention before we leave? It concerns the Unified Appeal. We haven't found it yet. We are almost sure there is a statement that says the defendant shall be present during all stages. We will continue to look for that.

THE COURT: I will be glad to hear from you. He is going to do the voir dire. What I am going to do—he is going to do the voir dire and I will give you any chance—

MR. RICHTER: No need to worry about it right now.

THE COURT: I want you to be excused at this time, the prosecutors—the cameraman is not here. I assume it is not on. Had you [59] rather do this in chambers? Would that be easier?

MR. LEIPOLD: Perhaps that will be best.

THE COURT: Let's adjourn to my chambers and bring Mr. Lonchar right through here and we will just set-up and do it in my chambers. Mr. Snead, you may be here, if you'd like.

We will be in recess for about 10 minutes.

(Whereupon, a recess was had at this point)

(REPORTER'S NOTE: The following occurred in chambers in the presence of the defendant, his counsel, deputy sheriffs and the court reporter)

THE COURT: All right. Mr. Lonchar, the Court is concerned about your request for the simple reason that I want you to understand everything that is going on. I want you to be able to advise and assist your attorney during this trial.

Mr. Leipold, why don't you explain to the Court the discussion that you have had with [60] your client about this situation?

MR. LEIPOLD: Mr. Lonchar basically has advised me that he does not want to hear falsehoods told about him, that he doesn't want his family to have to go through this, that he doesn't want his family and the other people to go through this, that he doesn't want to be present in the courtroom while he hears false testimony given about him, that he would rather remain absent from the courtroom during that period of time.

I am most definitely not in agreement with this.



MR. LONCHAR: As far as being present and assisting Mr. Leipold, I haven't assisted Mr. Leipold since he has taken this case. I have told him things, I have never told him the truth. Personally, I like the man, but personally I never trusted Mr. Leipold, for my own reason. I have never told him what happened, so, how can he assist me, you know. We know the outcome of this trial, you know, so, you know.

MR. LEIPOLD: I might should inquire into the question about him not trusting me [61] before we get on in this matter.

THE COURT: Do you want to explain that a little bit more, Mr. Lonchar, why you would not trust Mr. Leipold?

MR. LONCHAR: I have my reason. Nothing personal, just, you know—and I have never ever, you know—I have told him three or four different stories and I have never actually told him exactly what happened, and I have my reasons. Like I say—and, so, you know, there is no way they he can assist me, you know, by being present. I can't assist him because I haven't been assisting him.

MR. LEIPOLD: We have some serious problems right here now with what has just been said. I mean, I don't even know what to go forward with now. I really don't know what Mr. Lonchar is saying at this point in time.

THE COURT: Mr. Lonchar, do you want to explain to us—we have had numerous hearings in which I have asked you whether you had any complaint about your attorney. I have given you more than an adequate amount of time to discuss all these things with your attorney. You have had a lot of evidentiary hearings, a lot of [62] other proceedings. Now we are getting ready to go to trial and now you don't trust your attorney. Is there some reason why you are saying that?

In fact, we had one hearing in here, Mr. Leipold; he advised us then that you had just begun to tell him something. You know, that was—

MR. LEIPOLD: Are you saying, Larry, because I was a former DA, that you don't trust me? That is what you mentioned once before, that I, being a former District Attorney, and there might be a problem, is that what you mean?

MR. LONCHAR: Yes. That is part of it. But so far as Mr. Leipold, you know, as attorney, I have no objection, he is a very good attorney, But, you know, I do—you know, I just want this over with, you know. Hell, we know the outcome of this, and we are playing all these games. But I haven't, you know, I have never, you know, told Mr. Leipold.

MR. LEIPOLD: Would you tell me the truth at this point in time, Larry, in private?

MR. LONCHAR: No.

MR. LEIPOLD: Would you tell someone [63] else the truth?

MR. LONCHAR: No.

THE COURT: Mr. Lonchar, all we can do is—and I don't mind saying this, I will say this on the record now, in my opinion, the attorney you have now is one of the best criminal attorneys that I have ever seen—

MR. LONCHAR: Sure.

THE COURT: —absolutely, no reason why you should—

MR. LONCHAR: No. I know.

THE COURT: —be—

MR. LONCHAR: I am not asking for another attorney.

THE COURT: I have seen his work in this case. I have seen his work in a lot of other cases. He has done everything that he possibly can for your benefit and for your assistance. Now, you know, if you choose not to tell him things that help him, I don't know what I can do about that.

MR. LONCHAR: There is nothing. That is true.

THE COURT: Well, I would implore you as best I can, Mr. [64] Lonchar, to tell Mr. Leipold what it is that

you need to tell him. Whatever question that he asks you, to cooperate with him, and you are the only one. Apparently you have come to the conclusion that there is a foregone conclusion in this case. We haven't struck the jury yet and I don't understand why you have that attitude, and I would ask that you just do everything that you can to assist your attorney.

MR. LEIPOLD: Is there anything else that you want to tell the Judge, Larry?

MR. LONCHAR: No. I just repeat the way that I feel, you know. My presence is irrelevant. And like I say, I haven't been assisting him and I am not going to start assisting him, and I am asking, you know, like I say, I realize at times I will have to be present. I realize that and I will cooperate. But as far as, you know—I have read that the law says once the jury is impaneled that I don't have to be present, you know. I don't want to cause a scene where you have to handcuff me and chain me to the seat and gag me and all that. However, I feel, you know, if that is my only alternative, then I will, I mean, that is what I [65] am asking, you know, to avoid all of this, you know. I know what is going to happen in this case and, you know, there is nothing I can do about it and—

THE COURT: You say you know what is going to happen in this case. Is there anything that you want to tell me about that? What do you think is going to happen in this case?

MR. LONCHAR: Well, there have been a lot of fabrications, you know.

THE COURT: Well, see—but that is the purpose of a trial, folks can—if you don't help your attorney, if you don't give him the ammunition, if you don't give him the assistance so that he can protect you, then how can you possibly expect that the result will be any different than what you have already decided in your mind it is going to be?

MR. LONCHAR: Well, it is just, you know—I mean, I am just being realistic and come on—you know, a jury will—I mean police officers say this, the jury is going to, you know, take my word that he is lying, you know.

THE COURT: It happens. Happened in my [66] court before. The jury makes up their minds based upon the evidence. If you choose not to participate and to be aware you are damaging your case, I am sure.

MR. LONCHAR: I have no case, Your Honor, I have no case, you know, this—you know—

THE COURT: Well, all right. I am sorry you feel that way. But all I can do is advise you as to what your rights are and advice you what your alternatives are. It is your decision.

MR. LONCHAR: That's right.

THE COURT: If you choose not to assist your attorney and you choose not to be present, I will probably allow you to have that option.

MR. LONCHAR: Thank you.

THE COURT: Mr. Leipold, anything else that you want to say on the record?

MR. LEIPOLD: I just think this is a mistake as far as the way to conduct the trial, and I advise Mr. Lonchar I think it is a serious mistake and I don't agree with his decision.

THE COURT: Well, maybe he can reconsider. I will give him a chance to think [67] about it. Obviously, I do want him during the voir dire which may take some period of time, and I once again ask him before—I will ask you, Mr. Lonchar, I will ask you to ask Mr. Leipold to advise me when you wish to be excused and at that point I will reconsider it and I will ask him to reconsider.

MR. LEIPOLD: There is one matter which, if the State is going to object to this, if there is going to be a decision for you to make, I would ask, if possible we try to make it prior to voir dire because there is another question that certainly I am going to want to ask the jury—I mean, I want them to know.



THE COURT: The State said they don't object to it.

MR. LEIPOLD: I have a feeling they were changing their minds. I want to question the jury about that and what impact it might have on them.

THE COURT: I think to some extent my job is to advise people what their rights are and let them make their own decision as to how to conduct themselves during trial. You tell me whether there is some Constitutional objection [68] that you see that I need to rule on, but other than that, the way I understand the law, if the defendant chooses to absent himself and not be present during the proceedings that is his right. We are not doing anything against his will, without his presence. He is voluntarily excusing himself from the proceedings. If he does that, I don't know that I have a right to require him to be here. There are certain times I do have to, for identification purposes, the Supreme Court has already ruled on that, I believe.

MR. LEIPOLD: Okay.

THE COURT: Let's get a jury.

MR. LONCHAR: You will let me know when I am allowed to excuse myself?

THE COURT: Well, I think—what we are going to have—we will have voir dire, at that point, whenever—if you want to be excused you can have your attorney make that request, again, I will allow you to be excused unless somebody comes up with a case or some authority that tells me that I can't allow you. I will allow you to be excused for those parts of the trial that you don't want to be here for, [69] but you realize there are certain things that you have to be here for, for identification purposes?

MR. LONCHAR: Sure.

THE COURT: If you want to ask during voir dire along those lines you may do so, assuming that is going to happen.

MR. LEIPOLD: All right.

THE COURT: Let's go back into the courtroom.

(REPORTER'S NOTE: The following occurred back in open court)

THE COURT: I call for trial the case of the State of Georgia versus Larry Grant Lonchar.

Is the State ready?

MR. RICHTER: The State is ready, Your honor.

THE COURT: Ready for the defendant?

MR. LEIPOLD: The defendant is ready, Your Honor.

MR. RICHTER: I don't believe the issue has been joined on the face of the Indictment.

THE COURT: I will ask that you do that.

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[557] THE COURT: What I am going to do is do my preliminary charge to the jury and allow you to make opening statements—Mr. Leipold are you going to make an opening statement at this time or to you want to reserve your opening statement?

MR. LEIPOLD: I anticipate going ahead and saying something.

THE COURT: All right. Now are you going to need time before you start your evidence or just sometime along in your evidence?

MR. RICHTER: I think before. I think before. The one—I had the—I am not sure of the Court's ruling as to one issue but I wanted to clarify—I think you sent us out of the courtroom when you were discussing with Mr. Leipold, with his client, the issue of whether or not the defendant could voluntarily absent himself from the courtroom. I would like to cite to the Court the case of *Lewis Versus The State*, which I tried in front of Judge Peeler many years ago where the Court of Appeals ruled that it is certainly within the Court's discretion and that in any event the State has [558] the right to have the defendant present in the courtroom at such times as witnesses are here where identification of the defendant is in issue.

Of course, we would insist that the defendant ought to have to sit in this courtroom, and at your discretion, whether you let him go or not, and I think that there are some statutory parts in the case for the defendant to have to sit in the court room to hear everything. Plus, I think that the Unified Appeals does state in its very language that the defendant needs to be present in the court room so that he may respond to questions from the Court as to his satisfaction with the services that his attorney has rendered. And if he is not in the courtroom he can't do that.

I think that the Court could perfect the record on that issue if it wanted to. My feeling is the safer course would be to keep him in here. My concern is under the Unified Appeal. If he is not in the courtroom, regardless of any other Constitutional rights that he might have, he can chose not to be here and you could, in your discretion, in a regular [559] trial say, all right, Mr. Lonchar, this is a burglary case, we will let you out of here. But I am concerned that somebody is going to be reading over—habeas corpus lawyers are going to be reading over the uniform rules and say, aha, it was impossible for the defendant to know what his attorney was doing. And I think we either have to have a complete waiver of objections on that basis by the defendant, on the record, knowingly and voluntarily, or the Court ought to make him sit in here, because I think this is the tight rope that you are walking. It is one, really, that could be avoided altogether, and I would urge the Court to avoid it.

THE COURT: All right.

MR. LEIPOLD: I speak now as an advocate for the position that I might think is the appropriate one, but, rather, my understanding of the Canons that I should convey the desire of my client to the Court, and my client has again reiterated this morning that he does not want to be present.

I have urged him to stay and urged him to change his mind on the things that he told [560] the Court yesterday.

There were matters that we discussed in camera that I think would justify the Court in acquiescing as far as his desire to be out of the courtroom. I am not happy with it, I don't agree with it, but my understanding is that is his desire, unless he advises me otherwise. I have asked him that a short period of time ago.

THE COURT: Mr. Lonchar.

MR. LEIPOLD: Stand up.

THE COURT: You recall the discussion that we had yesterday morning, sir?

MR. LONCHAR: Yes, sir.

THE COURT: You will recall both the Court's request and your attorney's request that you remain in the courtroom, but that I told you that that was the decision that I would probably allow you to make. I wanted you to sit through the voir dire process and I wanted you to have an opportunity to reconsider that issue.

I am going to allow you, if you wish, to withdraw yourself during those parts of the trial that you think is—that you want to be excused from, if you wish to do so. I want to advise you, however, that, obviously, you would [561] not be here, first of all, to assist your attorney in responding to questions and certainly you would not be here to evaluate what it is that your attorney does in your behalf. If you want to voluntarily give up those rights that you are, in fact, giving up a very valuable right that you have, and I am sure Mr. Leipold is going to do an excellent job, do the best possible job that he can do on your behalf, there is no question about that. There is, however, no question that it is always better to have your client with you in court, both for strategic purposes and also for information purposes. Mr. Lonchar do you understand what I am telling you?

MR. LONCHAR: Yes.

THE COURT: Now are you telling me that you still want to be absent from certain parts of the trial?

MR. LONCHAR: Yes, sir.

THE COURT: Do you understand that there may be certain parts of the trial which I will have to direct



that you be here, for identification and for certain other purposes, do you understand that?

[562] MR. LONCHAR: Yes, sir.

THE COURT: All right, sir. I will at any time give you the opportunity to come back into Court whenever you wish to come back into Court and I will do whatever is necessary to facilitate your re-entry back into Court out of the presence of the jury. So, you can come back in whenever you'd like. Do you understand that, Mr. Lonchar?

MR. LONCHAR: Yes, sir.

THE COURT: Is there anything that you want to ask me about anything that is going on so far?

MR. LONCHAR: (No answer)

MR. LEIPOLD: I really don't know anything to add to it. I have been through it a number of times. I would ask if Mr. Lonchar—where he is he going to be?

MR. WOODHAM (Deputy Sheriff): Our office.

MR. LEIPOLD: The holding area?

MR. WOODHAM: Yes.

THE COURT: You can—

MR. LEIPOLD: I recognize, and I didn't really know what the State is going to do, if I [563] comment on this in opening. If they are going to object to it, then I'd ask the Court to say something during the pretrial. I don't want this jury thinking that he has been removed from this courtroom by the Court, and I have a feeling that could possibly be the thinking. The jury would think that there has been some type of demonstration, that it was necessary to remove him. I want to make it clear that—either let me say something during opening or—certainly would not be evidence to the fact that he made a decision to remove himself voluntarily from the courtroom—or you say something.

MR. RICHTER: Contrary to what Mr. Leipold is concerned about, we plan on commenting in so far as we can do so on the fact that the defendant has for some reason or other, which we do not know, decided that he

would not want to be present during the proceedings. So that it would be clear exactly that it is not a matter that he has been removed. I think that it is just a matter where he is exercising the right. It is not the same as failure to testify. I would never comment on that sort of thing. But he has the right to be present. He [564] has the right, which apparently the Court has decided to allow him, in your discretion, to waive. And that is all that we'd request. We wouldn't dwell on it, but basically it is ludicrous to have a jury of grown-ups in here and not at least answer that basic question. If the Court wants to explain it so that it will be coming from a neutral and impartial source, that is fine, as long as it is just factual and concise as to the fact that the defendant has exercised his right not to be present. And you could give them a cautionary instruction that they are neither to hold this for nor against him, and this is a circumstance of the case like any other.

THE COURT: I will instruct them at the close of the case. I will allow Mr. Leipold to make any statement that he wants to make during your opening remarks. I will direct the State not to make any kind of comment whatsoever about it. It is not your place to comment on that at this point in the trial.

Now, during the closing you may or may not. I will have to decide that at that point.

MR. RICHTER: May I respectfully urge [565] the Court that there is a large body of case law in this State that states that anything that occurs within a trial, such as in a case where the defendant joined issue and then fled, I could comment and, in fact, would be entitled to a flight charge in that case. I could comment on the behavior of counsel, the demeanor of witnesses, I can comment on anything that occurs within the sight of the jury, that is a fact which they observed in the trial, and I am not—

THE COURT: I said during the closing, Mr. Richter. When I said, you may not bring it up in your

opening statement, which is supposed to be what you expect the evidence is going to show. That is a rather different point. I didn't say that you could not do it in your closing. I will have to see during the trial. I always reserve my right. I don't see any problem with it at this point. I am going to give Mr. Leipold a chance to make, if he wishes to make, a comment about it. I will give the jury my precharge on the law and then allow each of you to make your opening statement and then we will recess at that point.

[566] MR. PETREY: There is one more matter. You had indicated yesterday, as far as sequestration is concerned, from what you said yesterday, you would not impose it, which I would at this time reiterate our previous request. In the light of the charges and the nature of the case we ask the Court to sequester the jury and, obviously, your instructions—this is one of the headline articles on one of the papers and we would, of course, reiterate our same request made yesterday.

THE COURT: I assume it is still your request that the jury not be sequestered?

MR. LEIPOLD: Our position has not changed.

THE COURT: Your client's position is still the same?

MR. LEIPOLD: As far as sequestration, you have no objection to the jury being dispersed?

MR. LONCHAR: No.

MR. LEIPOLD: No.

THE COURT: I am going to allow them to be dispersed. I will give them appropriate cautionary instructions at the close of the day.

[567] MR. PETREY: Would you just—would the Court keep the question open during the course of the trial, if something else comes up?

THE COURT: The Court will keep all questions open.

MR. PETREY: Will you just keep that—

THE COURT: I will keep all questions open during the course of the trial.

MR. PETREY: Thank you.

THE COURT: Despite my severe appearance I am not inflexible??

Does he want to be here for the charge?

MR. LEIPOLD: I thought he didn't want to be here for the evidence—

MR. RICHTER: I want to get one clarification.

MR. LEIPOLD: —at his request—

THE COURT: Hold the jury for a second. I thought that he wanted to be here—the only—I assumed you'd let me know.

MR. LEIPOLD: My understanding, he does not want to hear the opening statements.

THE COURT: All right.

(Reporter's Note: The defendant was removed from the courtroom at this point)

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[1340] MR. LEIPOLD: Obviously, what I mean, no case on point as to my position, Your Honor.

THE COURT: Anything else for me to take up pre-trial—you say you have some requests to charge which I have not yet seen from either one of you?

MR. LEIPOLD: We do.

MR. RICHTER: We have none, Your Honor.

THE COURT: Anything in the requests to change that needs to be taken up before we go into receiving evidence?

MR. LEIPOLD: On the point I was making to you a minute ago, presuming we are going to have a charge conference and it is going to take a bit of time, and I think the evidentiary portion will be right short, I wanted to know if you want the jury to go.

THE COURT: The jury isn't going any place. As you know, the jury has been staying in the box.



MR. LEIPOLD: My suggestion was, this might be somewhat lengthy. I frankly—either way the Court wants to go.

(The Defendant was returned into open Court at this point)

[1341] THE COURT: Mr. Lonchar, this is the part of the case where the jury gets to hear evidence, as I am sure you have discussed with your attorney, but I will make sure that you understand, the jury gets to hear evidence on the question of what is an appropriate punishment. I don't know whether you've had a chance to talk with your attorney about your presence during this part of the case.

Mr. Leipold, have you talked with him about that issue this morning?

MR. LEIPOLD: Yes, I have.

THE COURT: Have you—let me ask you, Mr. Lonchar, what is your request? Do you want to be here during this part of the case?

THE DEFENDANT: Yes, sir, I'd like to object to the way—if he is going to call some witnesses, and I have already stated I do not want no witness called on my behalf or anything in my behalf. I just like to be here, you know, if he does it against my wishes.

THE COURT: Well, do you want—do you want to have it held in my Chambers to discuss that? Mr. Leipold and Mr. Lonchar, do you want to have the hearing in the Chambers?

[1342] MR. LEIPOLD: I think, for the record, perhaps we should.

MR. PETREY: We can leave.

THE COURT: No. We will do it in my Chambers. I will ask the defendant and defense counsel and the court reporter to come into my Chambers and we will discuss that on the record but outside the presence of the other folk.

(The following occurred in Chambers with the above-mentioned individuals present)

THE COURT: Do you want to explain to me what it is that you are concerned about, about Mr. Leipold presenting witnesses, please?

MR. LONCHAR: Yes, Your Honor. This is my life, you know, I have made my decisions, you know, I have made it before the trial even started. I tied my attorney's hands. I have my reasons. And now he'd like to present my dad, he'd like to present, you know, other, you know, and I strongly object to it. This is my life and I am competent to, you know, decide, you know, who I want or who speaks in my behalf, and I—if I have, you know, I guess—this is my right, I would like nothing spoken on my behalf.

THE COURT: Well, you understand, I am [1343] sure that you do, Mr. Lonchar, and I don't mean to make light of this, but do you understand the jury is going to decide whether or not to—

MR. LONCHAR: Sure. Yes, sir.

THE COURT: —to impose death penalty in this case?

MR. LONCHAR: That's correct.

THE COURT: Mr. Leipold, have you had a chance to talk—

MR. LEIPOLD: I am somewhat at a loss here. Mr. Lonchar has forbidden me to call his father as a witness in this case.

MR. LONCHAR: He is not my father. I could have had, you know, other family here, you know, friends. I, you know, I don't—if I wanted to defend, would have produced witnesses for the guilt or innocence trial part of the trial, you know. I tied your hands and I strongly object to anybody being called on my behalf.

MR. LEIPOLD: The problem I have, of course, some ethical problem as to what do I do at this point in time, and I don't have the slightest idea.

MR. LONCHAR: This is my life. I feel [1344] like I am competent to stand trial and competent to make my own decisions as far as, you know, who should be called.

THE COURT: Well, you know, I will let you make that decision. This is a different situation now. Okay?

MR. LONCHAR: Yes.

THE COURT: I think to some extent the Court has a stake in making sure the jury gets the information that it needs to make a decision. And, Mr. Lonchar, for whatever reason that you have decided that you don't want to present any evidence, I am going to request, on behalf of the Court, that Mr. Leipold make some sort of presentation of whatever you think is appropriate under the circumstances. Whatever your reasons for feeling that way and whatever decision you have made about that is your decision. I want you to understand this jury has made the decision that you are guilty of three counts of malice murder. For the law to execute properly—I don't mean "execute" in the corporal, I mean—

MR. LONCHAR: Yes.

[1345] THE COURT: —for the law to go forward, this jury has to have information. Okay? And if you just decide to stand there and not present them anything, the jury won't have the information that it needs. Now, see, the State has the burden of proof in the guilt-innocence part of the trial to prove you are guilty. You could take the stand if you wanted to, and the State still has the burden.

But now we have a situation where the jury has found you guilty, so, now the question becomes what should the jury do. And that is a whole different ballgame.

MR. LONCHAR: Well, the State is going to present, you know, my past record and they are going to—

THE COURT: You have got—and I will say this on the record, but not in front of a lot of folk—you probably have one of the better attorneys that I have ever seen operate in this court.

MR. LONCHAR: Right. I understand.

THE COURT: You ought to listen to him rather than making up your mind. You don't know what is going on. You are too involved in [1346] this case. You are obviously the defendant. The whole purpose of our system is to get an advocate who can evaluate a case and make a decision and assist you. That is why the Constitution gives you a right to have an attorney. That is why Mr. Leipold has been there arguing every moment on your behalf, not because of what you want, but because of what our system requires. Okay?

MR. LONCHAR: Yes, sir.

THE COURT: And if you want to go and do one thing, that is your decision, but I am the Judge here and I have got a system to protect and I have got a system to make sure it is fair. There is not just you involved. We have got those jurors in there who have to make a decision about a very, very important matter.

Mr. Leipold feels very strongly about your case. I know he has worked very hard on this case and has done a lot of things on your behalf, and I am telling you that, in my opinion—and I am going to ask him to present the people that he would have presented.

MR. LONCHAR: Well, like I say, that is the case, just my dad is here, you know, I could [1347] call my whole family here, my friends, you know, but, you know, so, just present one person here—

THE COURT: Because he is representative and probably is the most—I have gotten—you know, you could present, obviously, everyone who knows you, but the jury wants to get some flavor of the kind of person that you are, and a person who can speak on your behalf or can give some insight into the kind of person that you were, and kind of person that you are, that is important.

What else do you have?

MR. LEIPOLD: The only thing that I intended to produce was his father and also a letter that we'd like to offer as the reason for the absence of his mother, which I



am sure the State will object to, but that is a matter to be taken up.

THE COURT: Is it the same letter that I got?

MR. LEIPOLD: Yes, sir. As a matter of fact, it is. You gave me a copy.

THE COURT: All right. I will probably allow that. I don't know. I will hear from [1348] them.

Mr. Lonchar, I am going to ask Mr. Leipold to make every argument that he can possibly make and I am going to ask him, you know, to try and present the evidence that he thinks is appropriate under the circumstances.

I don't know whether you want to testify or not, or whether you want to say anything to this jury or not. All the Court wants to do is make sure that down the road you don't have a change of heart and say "I wish I had done something differently".

MR. LONCHAR: I won't.

THE COURT: "I wish I had done this". And I guarantee you there will come a time when you just kind of absent yourself from this part of the case, you are going to be sorry you did and, so, I am going to ask that you be in court during this part of it. I think that it is important for the jury to see you and I think that it is important for you to be present. I have granted your request before.

MR. LONCHAR: That's correct.

THE COURT: And, Mr. Lonchar, whatever else goes on in this case you have got to [1349] understand that I am a human being and you are a human being, and there is a whole other realm beyond what goes on in court. Okay?

MR. LONCHAR: All right.

THE COURT: Now, how are you doing as far as your breathing?

MR. LEIPOLD: I am okay. Kind of take a break between arguments maybe.

THE COURT: I am going to give the jury a very short pre-charge and then go into the evidence, and I

would like to take a look at that question, legal question, so, I will take a five minute recess just so I can take a look at that question on the parole issue and see what is going on.

MR. LEIPOLD: We might want to make a couple of more motions that we have.

THE COURT: There are certain things—

MR. LEIPOLD: I have some motions.

THE COURT: All right. Let's go back out.

(The following proceedings occurred in open court)

\* \* \* \*

IN THE SUPERIOR COURT OF DEKALB COUNTY  
STATE OF GEORGIA

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[Title Omitted in Printing]

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Proceedings held in the above-styled case before the Honorable Robert J. Castellani, Superior Court Judge, without a jury in Dekalb Superior Court, Decatur, Georgia, on November 2, 1987.

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**MOTION FOR NEW TRIAL**

[2] THE COURT: This is a hearing on the motion for new trial in the case of the State of Georgia versus Larry Grant Lonchar. Let the record reflect that the State is represented by Mrs McNamara and Mr. Richter, and the defendant is present along with Mr. Warner, his attorney.

You look like you have lost some weight.

MR. LONCHAR: They don't feed too well.

THE COURT: I will see what I can do about that.

MR. LONCHAR: Yes. I am sure you can.

THE COURT: All right. I guess the motion is the defendant's motion.

MR. WARNER: Your Honor, it is. For the record, it is a pleasure to be before the Court.

I, on Mr. Lonchar's behalf, have taken up a matter with counsel back in Chambers just briefly before this motion was heard. I discussed the matter with Mr. Lonchar here in the courtroom earlier before I conferred with the Court and with counsel. Mr. Lonchar's position, Judge, basically is that the mandatory appeal in the State of Georgia, insofar as its [3] application to him is con-

cerned, does not require that he go forward with any appeal in this case. I have told him that my position as an officer of the Court and as his representative is that it is mandatory, that it is reviewable directly before the Georgia Supreme Court after it goes through this Court on a motion for new trial; it is dependent upon what this Court does here; and that my position is that through the Georgia Supreme Court's initial review under the Unified Appeal Act it is mandatory, and he basically does not have any choice insofar as it being presented to that Court.

Mr. Lonchar has read the case of Gary Gilmore out in Utah who wished to die, and it is his position that he wants the same thing. I am in a position as a defense lawyer of usually representing interests that want to live.

Mr. Lonchar initially—I understood him to say that he wanted to present this to the Court. I feel somewhat boxed-in by making this argument and trying to do everything that I can to save his life because I think that is my duty. Mr. Lonchar wanted to present this to the [4] Court. I thought he might want to present it himself to the Court.

It is my position that it is mandatory, and his position, and he wants it expressed to the Court, that it is not mandatory.

If I have left anything out on his behalf that he wants said in that regard, I would like for him to step forward and say something at this time, Your Honor.

THE COURT: Mr. Lonchar, is there anything further that you wish to add?

MR. LONCHAR: Well, I am not just speaking about the Gilmore case, there are other cases. The federal courts have ruled that a man has the right to deny his appeals and the same federal courts have made this decision, and I feel that I am just citing the Gilmore case as he waived his state appeal rights. I am not—I feel that since this is, you know, a situation that has been decided



all the way to the United States Supreme Court, that I have the right to waive my appeals, and I feel that this is unconstitutional, that I am being forced through this appeal.

I am not helping my attorney on my own [5] appeal, so, this is a farce then because my helping him defend himself, you know, I feel that, you know—like I say, you deny this, I feel that the Georgia Supreme Court should decide it before we go forward with this motion because, like I say, I feel the federal courts have made this quite clear, and not only Gilmore but other cases, that a man has the right to deny his appeal.

THE COURT: Let me say, Mr. Lonchar, that under our system of government there are two separate sets of laws; there is a Federal Constitution and also the State Constitution. And the case that you cite, as far as the federal cases go, may apply to the Federal Constitution, but our supreme court is the only court that can decide the State Constitutional issues, and our State Legislature and through the Supreme Court of Georgia has said that it wants to have a automatic review of all cases in which the death penalty is imposed.

As a judge I have to agree with that principal anyway, but even if I didn't agree and agreed with you, I think the law is very clear that the Supreme Court has directed all trial [6] courts that they must submit for review any case in which the death penalty is imposed, whether or not the defendant wants a review.

I understand what your concerns are. I hope you understand what mine are.

MR. LONCHAR: Yes.

THE COURT: Mine is to do this job according to the law and even if the Federal Constitution says one thing, our State Constitution also gives certain rights to folk and certain duties to judges.

MR. LONCHAR: Well, I am not familiar with Utah's State Constitution, but he was allowed to waive his state rights, so, I am not familiar—

THE COURT: That may be under Utah's law, and I don't know what Utah's law is. All I know, under the Georgia Constitution and the Georgia Law it is my opinion—I assume the district attorney has the same position—I don't know whether you do or not, but I assume you do.

MRS. MCNAMARA: Yes, Your Honor, it is our understanding of the Unified Appeal that no matter what Mr. Lonchar wants to do it is going [7] to be reviewed by the Supreme Court. It is going to be reviewed by the Supreme Court, it may be reviewed with appointed counsel and it may be reviewed properly.

THE COURT: It will be reviewed properly. I have no doubt about that. I have spent a lot of time talking with Mr. Warner and Mr. Leipold about this case.

Mr. Lonchar, I would, to the extent that you are asking me to withdraw your notice of appeal, I will deny that on the basis that there really is no alternative. In my opinion the Supreme Court has said society has an interest in this case, too.

We don't take things and do things like this in this kind of case lightly. For that reason I think that there is an interest that the state has in making sure that everything is done according to law.

For that reason I will proceed with the motion for new trial at this time. Mr. Warner, I understand you are in somewhat of a difficult position, probably in the same position Mr. Leipold was in in this case, and the Court must ask you to proceed.

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IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

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Case Number 90 V 2735

CHRIS LONCHAR KELLOGG  
As Next Friend to Larry Grant Lonchar,  
*Petitioner*

vs

WALTER D. ZANT, Warden  
Georgia Diagnostic and Classification Center,  
*Respondent*

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In Open Court Before Honorable Hal Craig  
Judge, Superior Court  
Flint Judicial Circuit

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HEARING ON MOTION FOR STAY OF EXECUTION

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Transcript of proceedings held in Butts Superior Court  
on March the 21st, 1990 before Judge Hal Craig.

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[2] PROCEEDINGS

THE COURT: At least in the beginning, I don't want to enumerate this as a habeas corpus proceeding because we're not to that stage yet but the Court is convening a hearing on the question of the competency of Larry Grant Lonchar to waive his right to further proceedings in this case.

Mr. Mears, I know you're, of course, participating in some similar proceedings with respect to that question. And the warden is represented today by Ms. Westmoreland and MR. Ree to protect the interests of the warden and the State in this matter.

I assume that the first thing that the Court might need to do is inquire of Mr. Lonchar what his feelings are about either this proceeding or his intention to forego further proceedings on his behalf.

MR. MEARS: Yes, Your Honor.

Your Honor, if the Court would allow me to introduce Ms. Chris Lonchar Kellogg who is Mr. Lonchar's sister. She is here, anticipating possible habeas by next friend. We simply wanted to introduce her to you.

[3] THE COURT: Ms. Westmoreland or Mr. Ree, do either of you have anything you want to say by way of opening remarks about this? The nature of this proceeding is a little unusual. So, neither of us have a lot of history to travel on.

MS. WESTMORELAND: No, Your Honor. And I think the Court is correct. I think the most appropriate thing to do at this point is for the Court to perhaps make inquiry of Mr. Lonchar to see where we stand in the nature of his wishes, so we will know where to proceed with relation to next friend habeas petition that is being attempted to be filed today.

THE COURT: All right.

Mr. Lonchar, are you Larry Grant Lonchar?

THE PETITIONER: Yes, sir.

THE COURT: I can do it by the way of testimony which may be the best way to do it.

Do you have anything that you would like to say about the proposed proceedings on your behalf?

MR. LONCHAR: No, sir.

THE COURT: The Court would like to question you about some of that. I don't necessarily have to swear you about that but I would like to know your position.

Mr. Mears is here today and I believe it's [4] your sister, Chris Lonchar Kellogg, is attempting to file or



wishes to file as the next friend to you an application for habeas corpus, raising certain questions about the legality of your conviction and sentence. Do you wish to have that proceeding to do that or would you like to do that on your own?

MR. LONCHAR: No, Your Honor, I strongly oppose this.

THE COURT: Do you understand that you are presently under at least one sentence of death and that your execution is scheduled and could take place as early as 12:00 noon Friday. I believe—is that correct? Does everyone agree?

Do you understand that?

THE PETITIONER: Yes, sir.

THE COURT: Do you understand that again as the Court understands your conviction, of course, is final? It has been appealed to the Georgia Supreme Court which affirmed your conviction and sentence and I believe an application for certiorari was made to the U.S. Supreme Court which was denied.

Again, am I correct? And everyone agrees?

MR. MEARS: Yes, sir.

THE COURT: Notwithstanding that, do you understand that there are other proceedings in which [5] you could question the legality of your conviction and/or sentence? Do you understand that you have other avenues of appeal open to you? Do you understand that?

THE PETITIONER: Yes, sir.

THE COURT: Well, why is it that you have chosen to forego those possible avenues of appeal?

THE PETITIONER: Why?

THE COURT: Why? Why have you decided not to do that?

Do you have any particular reason?

THE PETITIONER: There are many reasons but I don't believe I have to explain those reasons. I have been sentenced to death and I'm asking the Court to carry this out.

THE COURT: But do you understand that your execution is scheduled, as I understand it because of your conviction of three murders, I believe? Again, I'm traveling on my understanding. If at anytime I misstate it, I wish counsel for either side would correct the Court. But it's my understanding that you're presently under possibly three sentences of death, at least one, for some murders that you were convicted of in DeKalb County, is that correct? It was DeKalb.

MR. MEARS: Yes, sir.

[6] THE COURT: Again, your execution is scheduled for again, it could take place as early as noon Friday. Do you understand that that's the reason that you're being—that your execution is scheduled? Do you understand that that is the reason for that?

THE PETITIONER: Yes, sir.

THE COURT: Do you understand that the method of execution in this state is death by electrocution? Do you understand that?

THE PETITIONER: Yes, sir.

THE COURT: Is there anything else that you would like to say concerning your feelings about this matter or your scheduled execution?

THE PETITIONER: It's irrelevant. I don't see how it's relevant, my feelings.

THE COURT: It is relevant because the question of your competence to make that decision on your behalf has been called into question.

THE PETITIONER: So my feelings, expressing my feelings to this court, that's going to decide if I'm competent? Are you trying to analyze me?

THE COURT: I'm trying to find out by whatever means the Court has available whether you're competent to make that decision on your own behalf. [7] That will not be the sole deciding factor but it could very well be a factor.

THE PETITIONER: Well, I think you could tell just by our conversation here I'm not insane. I'm carrying

on a normal conversation here, sir. And I don't think the issue of competency should even be decided.

THE COURT: I understand. It was the Court's understanding that this proceeding was taking place because you have indicated your desire not to have any further proceedings filed in your behalf to stop this. I'm just trying as best I can to make sure that that is a knowing decision on your part, made by someone who is competent to make that decision. If it is, it's my understanding of the law that you would have a right to make that decision. You're under, as far as I know, a legal sentence to be executed for murder. Basically, if you're competent to decide to make those type decisions, you can choose to forego any further proceedings. You have that right under the law, as I understand it, at this stage at least. You're past any automatic appeals. Now, you had a right to an automatic appeal of your conviction when you were initially convicted in the trial court to the Georgia Supreme Court. Past that, any proceedings on your [8] behalf were something that you would have to decide to pursue. You had that automatic right.

You understand there are no other automatic rights to review this conviction and sentence? Do you understand that?

THE PETITIONER: Yes, Your Honor.

THE COURT: Do either of you have any other questions that you would like the Court to address Mr. Lonchar that I have not asked of him? I will not force him to be a witness in the case, even though this is a civil proceeding. The Court will not do that. I have conversed with him and it is on the record, what has been said. If either of you would like to call him as a witness, you may very well be able to do that since this is a civil proceeding.

Do either of you wish to call him as a witness and have him sworn to testify?

MR. MEARS: We do not.

THE COURT: Ms. Westmoreland?

MS. WESTMORELAND: Not at this time, Your Honor.

THE COURT: Is there any other area of inquiry that either of you would like the Court to make or if you have something that comes up, let me know during the progress of the proceedings. That would conclude [9] the Court's inquiry of Mr. Lonchar.

Again, do you have anything else you would like to state?

THE PETITIONER: No, sir.

THE COURT: Let me say to you, there may be a limit to this but for the time being, at least, if you change your mind, you still have at least, for the time being an option to proceed. Whether Mr. Mears would do that on your behalf or not, I can't indicate to you that he would but again, this being a civil proceeding, I can't appoint him or force Mr. Mears to represent you but I would imagine that he would try to protect your interests as best he could. But there very well could come a point between now and your date of scheduled execution, unless the Court for some other reason prevented that, beyond which it could not be stopped. So, I just want you to understand that if for any reason you're not completely serious about your decision, you need to know the severity or the consequences. Of course, that sort of goes without saying but there could come a point when they could not be legally stopped. There is no stay in effect right now. And we're less than 48 hours away from the first opportunity in which this sentence could be carried out. Do you completely understand that?

[10] THE PETITIONER: Yes, sir.

THE COURT: Have you been threatened, coerced or in any other way made to make this decision against your will? Has anyone forced you to do this, to make this decision, to forego these other appeals or proceedings?

THE PETITIONER: No, sir.

THE COURT: Have you decided this completely on your own without counsel from anyone else?

THE PETITIONER: Yes, sir.



THE COURT: All right.

If there is nothing else from either of you that you would like the Court to inquire about, that will end the Court's inquiry of Mr. Lonchar.

Mr. Mears, you may proceed.

MR. MEARS: Your Honor, if it please the Court, we would ask the Court to accept the petition of Chris Lonchar Kellogg as next friend for Larry Lonchar and the petition is a petition for writ of habeas corpus. And if I could, Your Honor, go through just a brief outline of not the petition itself but the basis for our bringing the petition to the Court at this time.

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[11] THE PETITIONER: Yes, sir. I believe this is nothing but a stall tactic. I believe I am competent. And my trial judge, this was addressed during my trial. He asked my trial lawyer many times what about—I don't believe it should be the issue. The issue is I've been sentenced to die.

THE COURT: And are you ready to have that carried out unless it is stopped in some fashion? You still want it carried out?

THE PETITIONER: That's correct.

THE COURT: All right.

That will be all for the time being. I want to give the Attorney General's Office representing the warden an opportunity to have Mr. Lonchar examined by the personnel of their choosing, when it can be arranged and hopefully that can be at the earliest opportunity. And I'm sure it will be. And I'll just sort of have to be guided by the time frame of that when we might reconvene for the other proceedings that might be necessary. Of course, the outcome of that examination may again cause the Court not to need to convene any other proceedings but we'll just have to see.

IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

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[Title Omitted in Printing]  
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HEARING ON COMPETENCY TO WAIVE  
FURTHER COLLATERAL REVIEW

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Transcript of Proceedings before Honorable Hal Craig,  
Judge, Superior Courts of Georgia, Presiding in Butts  
County, Georgia, March 28, 1990.

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[32] THE COURT: Let me address Mr. Lonchar for just a moment.

Mr. Lonchar, you understand that this proceeding still is inquiring into your competency or ability to waive any further review of your convictions and sentences; do you understand that?

MR. LONCHAR: Yes, sir.

THE COURT: Is it still your desire to waive or forego any other review of your convictions and sentences from the Superior Court of DeKalb County in which you were given a death sentence there?

MR. LONCHAR: Yes, Your Honor.

THE COURT: Are you still doing this freely and voluntarily?

MR. LONCHAR: Yes, Your Honor.

THE COURT: Have you been coerced in any fashion, for any reason, into this position, or is this something you just willingly decided to do?

MR. LONCHAR: That's correct.

THE COURT: Which is correct? Are you just willingly deciding to do this?

MR. LONCHAR: Yes, Your Honor.

THE COURT: Do you wish to make any other statements to the Court about why you decided to [33] forego any other review of your sentences and convictions?

MR. LONCHAR: No, sir.

THE COURT: Have you thought about that a good bit?

MR. LONCHAR: (Nodded affirmatively).

THE COURT: When did you make this decision? How long have you held this belief that you don't want to have your convictions and sentences reviewed? I know you participated to a limited amount in your trial. You didn't fully participate. Have you sort of had that feeling since that time?

MR. LONCHAR: Yes, Your Honor.

THE COURT: Have there ever been times when you wanted to have your sentences and convictions reviewed, or have you consistently felt like that?

MR. LONCHAR: That's correct. At the motion in DeKalb County, the motion for mandatory state appeal, I objected to that proceeding right there. And since that hearing, I've seen the U.S. Supreme Court has accepted a case regarding a mandatory state appeal. I felt that that shouldn't have been mandatory. I felt I should have the had the right to waive that appeal.

THE COURT: So you have had the feeling at least [34] since the time of the motion for new trial or direct appeal to the Supreme Court of Georgia that you did not want your convictions and sentences reviewed?

MR. LONCHAR: Correct.

THE COURT: And has that consistently been your feeling?

MR. LONCHAR: Yes, sir.

THE COURT: Have you ever felt from that time until the present that you changed your mind and wanted to have a review?

MR. LONCHAR: No, Your Honor.

THE COURT: I'm ready to proceed, then. You may call your first witness.

MS. WESTMORELAND: Your Honor, Respondent's Exhibit No. 6 is the transcript of the hearing to which Mr. Lonchar just referred about the mandatory direct review.

At this time we would call as our first witness, Mr. Cheyenne Puckett.

THE COURT: Do we have an understanding about that witness with the media? Is that understood?

MS. WESTMORELAND: I believe so.

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[112] THE COURT: Well, it was the Court's understanding that Mr. Lonchar did not desire counsel. Mr. Lonchar, let me address you—would you want Mr. Stafford-Smith to represent you as an attorney as counsel for you?

MR. LONCHAR: For what?

THE COURT: For any purpose—for purposes of this hearing or for any other legal purposes—do you want him to act, as your attorney?

MR. LONCHAR: I feel I don't need an attorney.

THE COURT: That's what I'm asking you. So, is the answer, no, then, you—

MR. LONCHAR: That's correct.

THE COURT: I can't—I could not appoint Mr. Smith in any event. If Mr. Lonchar wanted him to represent him in some capacity, the Court would certainly consider that, but it is the Court's understanding from Mr. Lonchar that he does not desire counsel. I cannot appoint someone counsel over his objection, at least under the present state of affairs in this case.

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IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

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[Title Omitted in Printing]

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HEARING ON COMPETENCY TO WAIVE  
FURTHER COLLATERAL REVIEW

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Transcript of Proceedings before Honorable Hal Craig,  
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[371] Stating all of that, the Court will find that Mr. Lonchar does meet the standard of *Rees v. Peyton*, that he has the capacity to appreciate his position and to make a rational choice with respect to continuing or abandoning further litigation, and that while he does not suffer from any mental disease or defect, he does have a mental disorder involving depression, that that disorder does not rise to the level of substantially affecting his capacity in the premises. That's my understanding of the evidence from what I've heard.

Therefore, the Court having found him competent to make his own decision about whether or not to continue or abandon further collateral review of his convictions and sentences, the Court will find that he has a right to waive those, and therefore, that Ms. Kellogg has no standing to present a next friend petition because he is competent to do that on his own, to make that decision.

Mr. Lonchar, do you understand the nature of the Court's ruling? The Court is finding that you are compe-

tent to make those decisions yourself. Do [372] you understand that?

MR. LONCHAR: Yes, Your Honor.

THE COURT: You also understand that, as I understand it, your execution is now set for 8:00 a.m. Friday morning. Do you understand that?

MR. LONCHAR: Yes, Your Honor.

THE COURT: All right. And you understand if you continue in your present posture with this case that your execution very well could take place then. Do you understand that?

MR. LONCHAR: Yes, Your Honor.

THE COURT: Do you have any desire to change your feeling about that?

MR. LONCHAR: No, Your Honor.

THE COURT: All I can say to you is give you sort of a warning like I did before. I'm not indicating that you should change your position. All I am indicating to you is that unless this proceeding is stayed, and the Court will deny the motion for stay of execution, that unless your execution is stayed by some other Court that it very well could take place in a little more than 24 hours and that if you have any desire to change your mind at all, you need to make that decision at the earliest possible moment because there may come [373] a time prior to execution in which you could not change that even if you then desired it. I can't say that that would or wouldn't happen. I'm just warning you, I wouldn't wait until I was ready to sit in that chair and make that decision because at that point it may be too late.

Is there anything else from either side?

MR. MEARS: Yes, Your Honor. Your Honor, we would ask the Court to direct the Warden to allow us access to Mr. Lonchar up until—at least through tomorrow night. It is my understanding they have a policy which could close down any access to counsel or anyone else at a certain time frame, and I believe it would be 4:00 o'clock tomorrow.

THE COURT: 4:00 o'clock tomorrow afternoon.

MR. MEARS: Right. Given the nature of these proceedings we've been in and given the fact that this is a rather unique case where there are still very viable avenues for appeals open to Mr. Lonchar, we would ask the Court to allow us to have access to him should he decide to elect to proceed or to ask us for further assistance to proceed in his collateral appeal. I can think of no greater tragedy if because of an administrative rule that [374] someone would die without having at least a last opportunity to seek the protection of the Court.

THE COURT: Well, I certainly don't put myself up as an expert, but just on having observed Mr. Lonchar as long as I have, it is also the Court's feeling that I have observed nothing that indicates his incompetency to do that. And it appears to the Court that Mr. Lonchar has taken this matter very seriously. He has not been flippant or cavalier about it at all. And I have no reason to believe that he has not put some thought behind that. But I agree with you, that he certainly has the ability to in effect stop this proceeding for the time being. The stay would in all likelihood have to be entered because there are claims in the petition or any petition that he could file that would require an evidentiary hearing. There is obviously not enough time and a stay would have to be entered.

Do you understand that, Mr. Lonchar? If you chose to file a habeas corpus petition on your own behalf that there are certain claims that could not be heard between now and then and would have to result in a stay. You understand that, don't you?

MR. LONCHAR: Yes, Your Honor.

[375] THE COURT: I mean, he can't just ask for a stay. Obviously, a petition would need to be filed asserting claims that would need an evidentiary hearing, and usually that is ineffective assistance. I'm not saying there is any in this case, but that is certainly one that guarantees you an evidentiary hearing and is used.

What about the recess question?

MS. WESTMORELAND: Your Honor, the prison has specific time frames for a certain time prior to a stay of execution in which necessary preparations are being made. I don't know the precise hours or anything that has been said at this point. I think we would urge the Court not to enter a specific order. First of all, the Court has indicated to the petitioner that Ms. Kellogg didn't have any standing in this action, so I'm not sure the Court could enter an order against Warden Zant certainly up until the appropriate time that visitation can occur. After that time, I would imagine that if Mr. Lonchar indicates he wishes to speak to counsel, I feel sure that request would be complied with under the circumstances of this case. If nothing else, I feel sure contact would be made at our office and under the circumstances in this case, we would [376] allow that request to be fulfilled.

THE COURT: Let me ask Mr. Parrish. I'm sure he could help us some.

What is the time frame in which a contact of communication with the prisoner would be difficult? Is there a certain time? Do you have a rule and regulation about that?

MR. PARRISH: Three hours prior to the time of execution.

THE COURT: Which would be 5:00 a.m., I assume, if the present schedule is adhered to.

MS. WESTMORELAND: I think Mr. Mears maybe referring to the end of visitation hours.

MR. MEARS: That's what I was referring to.

MS. WESTMORELAND: And that is a different question. Again, if Mr. Lonchar requests to see counsel sometime tomorrow night, then I think we can make arrangements and have that taken care under the unusual circumstances of this case.

THE COURT: Let me just address Mr. Lonchar. He is the one obviously the most directly affected by all of this.



Mr. Lonchar, is there anyone, other than perhaps your family, that is in the nature of counsel or advisor that you would like to be sure [377] you had contact with up until the last opportunity? Now, I don't suggest anyone, I just know that Mr. Stafford-Smith has represented you in the past and apparently has talked with you on an ongoing basis, do you wish to at least have access to him if you desire? Do you know how to contact him if you wanted to do that?

MR. LONCHAR: Yes, sir. I wouldn't have confidence in the Department of Corrections doing this for me because just for example, after this warrant was signed, Clive Stafford-Smith passed a note, called the prison and informed them for me to call him, this was at 2:00 o'clock in the afternoon. They passed it on to me at 10 minutes to 9:00. So I have no confidence in the Department of Corrections giving me access to anyone if I ask for it.

THE COURT: That's what I'm asking you, do you have anyone that you would like for them to know about that you would like to have ready access to?

MR. LONCHAR: Sure.

THE COURT: Other than family?

MR. LONCHAR: I have no reason, but if you want it for the record, I'll state Clive [378] Stafford-Smith, yes.

THE COURT: Again, you don't have an attorney, but he is the last legal representative you had as I understand it.

MS. WESTMORELAND: Your Honor, I think we can safely represent that if Mr. Lonchar makes a request to an individual at the prison at some late hour that he desires to have contact with counsel at that point, I will contact the Warden to be sure that that request is communicated immediately to the appropriate individuals. We all understand the circumstances of this particular case and are not about to rush through with something when we shouldn't be doing so. We all realize that Mr. Lonchar certainly has the option of changing his mind whenever he wants to.

THE COURT: I agree with you. He does, but I want him—and I have no indication that he is, for the lack of a better description, playing games with the Court. I don't think that's his intention. I think he is really serious about this. Some people have gone to some stage down this road and changed their minds. I don't know whether he will be one of those or not. But he has the right to make that decision. It's his decision to make and [379] it is due some dignity and respect and I'm not going to stand in the way of it if that's what he wants to do as long as he understands that if he is playing games, so to speak, that it certainly could backfire because there could come a time when he could not change his mind. As long as he understands that, that's all the Court can do.

Do you understand that? I don't want to beat that in the ground with you, Mr. Lonchar. I just want you to understand that because of the irrevocable nature of your penalty, it will be a little late in the game if you decide at a time it is too late to do anything about it.

MR. MEARS: Your Honor, then would the Court—I'm not doubting Ms. Westmoreland's intentions, however, she can not control anything at the Georgia Diagnostic Classification Center, if an order was simply entered that Clive Stafford-Smith would have access to Mr. Lonchar up and through the time of the close down, I guess it would be 4:00 o'clock in the morning—

THE COURT: Well, wait a minute now. We're talking about 4:00 p.m. in the afternoon as far as visitation and 5:00 a.m. the next morning if it is set at 8:00 in which communication after that [380] would be difficult; is that what you are saying?

MR. MEANS: That's what I'm referring to. Up and through that 5:00 p.m. period of time that—

MS. WESTMORELAND: 5:00 a.m.

THE COURT: It's 4:00 p.m. and 5:00 a.m. Let's keep them straight.

MR. MEARS: It's been a long day, Your Honor, 5:00 a.m. that he would have access to Mr. Lonchar so if Mr. Clive Stafford-Smith wanted to initiate any contact then he would have the ability to do so. I think that's vitally important that the Court at least extend to Mr. Lonchar that window given the nature of this case and given the status of his potential appeal in this case.

The Court has gone to some length to ensure that, while we objected and still continue to object to some of the things we've been denied, however, the Court has looked after Mr. Lonchar and I'm asking you not to stop now and put him back in the hands of the correctional officers, and simply enter an order to allow Mr. Clive Stafford-Smith to have access to him. The State cannot possibly be in any way harmed by such a request.

MS. WESTMORELAND: Your Honor, I will repeat, I think we get back down to whose interests we're [381] looking after. If Mr. Lonchar wants to see Mr. Clive Stafford-Smith that night then that request—we'll certainly make every effort to get Mr. Stafford-Smith in. I'll personally contact the Warden and tell him to comply with it.

THE COURT: All right. I'll tell you what, again, given the unusual nature of what we are dealing with, I have no doubt and no reservations that the prison authorities would honor that request but so there will be no sense of paranoia about all of this, I will enter that order.

If you can prepare one in the morning to do that—if you will include in there his phone number and address so there wouldn't be any question about getting the wrong number, or any list of numbers he wants to provide. I'm doing that mainly because Mr. Lonchar has indicated that if there was anybody that he would like to contact in such a capacity, it would be Mr. Stafford-Smith.

Is that right, Mr. Lonchar?

MR. LONCHAR: Yes, sir.

THE COURT: He's indicating he doesn't want to contact anyone, but if he did, it would be Mr. Smith; is that right?

MR. LONCHAR: Yes, sir.

[382] THE COURT: If you will prepare it, I will enter it tomorrow.

MS. WESTMORELAND: Your Honor, can I have one moment. The Warden is in the room.

THE COURT: Oh, is he.

MS. WESTMORELAND: If we could ask him?

THE COURT: I see him now. I don't have any problem with that. This is just to sort of soothe everyone's feelings about that.—And since it is unusual, there will be an order in effect so there is no question about it.

MS. WESTMORELAND: Can I ask one question, Your Honor? Mr. Mears is talking about an order to allow Mr. Stafford-Smith to initiate contact. I'm talking about an order for Mr. Lonchar to initiate contact.

THE COURT: No, this goes the other way. Mr. Lonchar, if he expresses that desire, he would have the right to do it.

And again, if the Warden has a different idea about the time table, let me know. I'm understanding three hours beforehand, 5:00 a.m.

Come down, Warden. We are all dealing with a subject that is a little unusual.

THE WARDEN: Let me suggest that we set up a [383] meeting Friday morning for Mr. Clive Stafford-Smith to meet with Mr. Lonchar should he request that and if he requests to meet with him anytime prior to that, then we would certainly do that. We would be willing, if that's all right with ya'll, to set up a meeting at 4:00 a.m. Friday morning for him to meet with Mr. Smith.

THE COURT: All right. Do you agree with that, Mr. Lonchar?

MR. LONCHAR: Yes, sir.

THE WARDEN: Should he request it.



THE COURT: Well, I will go ahead and enter an order. It is no reflection on anybody that is involved but just to make sure there is no question about it and there is something on the record in writing, I will do that.

MR. MEARS: I will prepare an order including the Warden's suggestion and it will all be in the order.

THE COURT: That will be fine. And at anytime earlier than that, all he has to do is call.

Is there anything else from anyone?

MS. WESTMORELAND: Your Honor, I think the only inquiry I have is, the Court has ruled on the [384] record—

THE COURT: I'm going to enter a written order. I will work on that tonight as I've done in other cases. I'll try to have it done tomorrow. I have set up some of it. I, of course, have Mr. Lonchar's procedural history. I have the law as I understand it. The finding of facts, of course, are blank in the computer because I didn't have them all, so I will do it as soon as I can, try to get it finalized as soon in the morning as I can. My secretary is coming in early and I hope to have it ready when she gets there.

That's all I can do. I promise to do my best. That's all I can do. But I intend to enter a written order.

MS. WESTMORELAND: Thank you, Your Honor.

THE COURT: Thank you.

(WHEREUPON, the hearing was concluded.)

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

No. 1:90-CV-2336 JTC

LARRY GRANT LONCHAR, By Chris Lonchar Kellogg,  
As Next Friend for Larry Grant Lonchar,  
*Petitioner,*

vs.

WALTER D. ZANT, Warden,  
Georgia Diagnostic and Classification Center,  
*Respondent.*

Transcript of proceedings before the Honorable Jack T. Camp, United States District Judge, on Thursday, November 14, 1991, in the United States Courthouse in Atlanta, Fulton County, Georgia, in the above-styled action.

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[436] THE COURT: I'll—what conditions did you ask that be?

MR. MEARS: I just need to meet with him.

THE COURT: In private in the holding cell?

MR. MEARS: That will be fine.

THE COURT: Is there any problem with that on behalf of the State officers here or the Marshal?

(No response)

THE COURT: That seems like a reasonable request to me, Mr. Mears.

MR. MEARS: Thank you, Your Honor.

THE CLERK: Please stand and raise your right hand.

You do solemnly swear the evidence you are about to give shall be the truth, the whole truth, and nothing

but the truth, so help you God?

THE WITNESS: Yes.

THE CLERK: Please have a seat.

### LARRY GRANT LONCHAR

Being duly sworn, was examined and testified as follows:

### EXAMINATION

#### BY THE COURT:

Q Mr. Lonchar, you have been here during the entire proceeding and I know at times this has probably been somewhat uncomfortable for you seeing your competency debated by several experts and talking about things that are personal [437] and private in nature, but I think that is an absolutely necessary part of this type of proceeding, and I have so ruled. The first thing I would like to ask you is having heard the proceeding, is there anything you would like to add or any statement you would make relevant to the issues that have been discussed here?

A No, sir.

Q Okay. All right.

Now, let me ask you this, and I would like you to tell me in your own words what you think the affect of your—if I understand you correctly, you wish to waive any further appeals on your behalf in federal court or otherwise; is that correct?

A Yes.

Q What do you understand the affect of that will be if you do waive those appeals and I rule that is appropriate?

A I will be executed.

Q And you understood from, for example, from Mr. Mears reading from a court case the manner of executions in Georgia, do you not?

A Yes.

Q And you understand—well, let me ask you this. What is the affect upon you personally of the execution of your sentence?

A I'm not really going to go into that. What difference [438] does it really make?

Q I want to make sure you understand, since your competence has been questioned here by experts, that the affect of execution is a final and irremediable affect and that is you are dead. Do you feel you have a full understanding in that regard?

A Yes, sir.

Q Now, let me ask you this. You heard Mr. Smith testify. You have had several meetings with Mr. Smith with regard to your rights to file a proceeding in this Court, is that right?

A Yes.

Q What do you understand your right in that regard to be? In other words, what rights do you understand that you are giving up if I say that you are competent to waive any further appeal?

A The right to appeal the State's conviction, sentence, their belief that there is errors made, their belief.

Q Do you understand that at least in Mr. Smith's opinion there is substantial reason to believe that it would be possible to have your conviction overturned?

A Yes, sir.

Q Do you understand that?

A Yes, sir.

Q Some of the—there are a number of issues that have [439] been referred to by Mr. Smith and Mr. Mears in the pleadings. One of those that Mr. Mears referred to earlier this afternoon was that it is not possible for you to waive your presence during a trial and that that alone would be sufficient to require another trial. Do you understand that?

A Yes.

Q Do you understand there are also, that I have seen in this case, I would say perhaps in excess of 20, 25



other issues that could be argued in this Court that might or might not require the reversal of your conviction or your sentence. Do you understand that?

A Yes.

Q Mr. Lonchar, I would like you to tell me in your own words why you have reached, and you can be brief if you wish, but why you have reached the decision that you would like to waive any further appeals and accept the execution of your sentence.

A Your Honor, there are many many reasons, you know. I just—you know, I just feel why do I have to justify this?

Q Well—

A This is my life. I have made this decision. Why are we even here? I don't understand this.

There is many reasons, you know. Dr. Kuglar testified that it is because I don't want to spend the rest of my life in prison. You know, that is his version. You [440] know, there is many reasons, you know, and I don't feel I owe anyone all of these reasons. I know why I want to die. I feel that is all I have to satisfy. Nothing personal against the Court or anything, there are many reasons.

Q Well, and I respect your feelings in that regard, Mr. Lonchar, and I realize your entire circumstances place you in a very difficult situation. But I think it is a fair question—

A Yes.

Q —when you ask me why I should ask you to justify that, and I will try to tell you.

I'm going to have to make a decision here whether your decision in that regard was a knowing and voluntary decision based upon a rational choice and whether you are able to make that rational choice and, quite frankly, having you tell me what you considered and why you made that decision I think is a relevant inquiry to assist me in making that finding that I must make?

A If you would like to go in your chambers and off the record because there are many personal reasons, you

know. I would gladly tell you, but it has been embarrassing enough that all of these lies have been said about my family and everything. There is a lot of personal reasons and I'm not going, you know, throw them out to the public. If you would like to go in there, I'll tell you many reasons why I want to [441] die off the record. If you need this, I'll gladly tell you but I'm not going to tell the public, you know, my personal reasons. It is like I said, there are some few things that are very personal.

THE COURT: I understand that and, like I say, I'm very sympathetic with the situation that you have been in during the two days of this hearing. But I think, under our law, I think it is an absolute necessity. Let me ask you—I'll ask counsel their input on your offer to justify that off the record, but I'm not sure that would be appropriate. I'm not sure anything you say in that regard that influences my decision would not have to be on the record. Now, I might consider allowing you to do that on the record in the grand jury room, but I'm not even sure that would be appropriate. I would want counsel's input on that.

Mr. Mears.

MR. MEARS: With all due respect to the Court, I believe if the Court were to accede to the request, I understand Mr. Lonchar's request, but if the Court were to accede to that, quite frankly, Your Honor would then become a witness to the proceedings, and I'm not sure what recourse would be required of us in that particular matter.

THE COURT: Without the presence of counsel.

MR. MEARS: Yes, Your Honor.

THE COURT: I think—and I think that probably—[442] I think probably anything other than a statement on the record in open court would probably be inappropriate.

Ms. Westmoreland, do you agree with that?

MS. WESTMORELAND: Your Honor, I understand and I certainly wish we were in a position where Mr.

Lonchar could do just what he suggested with the Court. I understand Mr. Mears' concerns and I think it does present problems, obviously, with subsequent—if subsequent courts are going to look at these proceedings, then they are not going to have the benefit of knowing what Your Honor heard in this matter.

THE COURT: Oh, no, no, I'm saying on the record. But what I'm saying is I was concerning allowing Mr. Lonchar to make an on-the-record statement, for example, in Chambers. But I'm not even sure that would even be appropriate and I'm not sure Mr. Lonchar would consider that consistent with his request. So I think probably that is best left on the record and in open court.

MS. WESTMORELAND: If Your Honor wants to go in Chambers with Mr. Lonchar on the record, I don't have any problem with it. I do understand the concerns Mr. Mears has as far as possible subsequent proceedings in the matter.

THE COURT: You understood that would be an on-the-record statement?

MR. MEARS: Yes, Your Honor, I do.

[443] THE COURT: I think your objection is probably well taken.

Mr. Lonchar, in that regard I think it probably would be inappropriate for me to consider anything other than an on-the-record statement that you make here in open court. Now, I think that is important to my decision, and if you choose not to go into those reasons, then I think—I think that is your prerogative. But that will, for whatever affect that will have, that will be factored into my making the decision that I must make in this case.

Q You understand that?

A Yes.

Q Let me ask you this, when did you make that decision that you did not want to appeal or that you wanted to accept your sentence in this case?

A Your Honor, I don't have to accept this death sentence. I was offered life from the beginning. I did not

want a life sentence. I don't have to be here so—you know, I gave up, you know, you can say years ago from the beginning. I did not defend myself. If I would have cooperated with my defense lawyer, I'm sure I wouldn't be here. But I have my reasons.

Q Mr. Donchar, do you understand that at any time you can change your mind up until the time your, of course, sentence is executed, and bring a petition for habeas corpus?

[444] A Am I aware of it? Yes, I am aware of it. You can be assured it won't happen. I'm aware of it.

Q Now, if I understand the law correctly, and counsel can clarify that for me, a habeas corpus proceeding in federal court, although if you abandon this proceeding you have to bring one in the future, but if you choose not to bring a habeas corpus proceeding in federal court, that is the last available means of relief that would be available to you from your sentence. Is my perception in that regard correct, counsel, based on the record in this case?

MR. MEARS: That's correct, Your Honor.

MS. WESTMORELAND: That is correct.

Q Do you understand that, Mr. Lonchar?

A Yes.

Q The last available recourse for you is a habeas corpus proceeding here in federal court?

A Yes.

Q Has anyone forced or threatened you in any way to try to persuade you not to bring this proceeding?

A No, sir.

Q Has there been any promise or anything to you that would have induced you in that regard?

A No, sir. There have been a lot of promises the other way if I would.

Q Okay. Let me ask you this. There has been some talk [445] about the conditions of your confinement. Can you tell me how that factors into your decision or how that has influenced your decision, the conditions that you are being held on death row?



A Your Honor, that is just one—I don't even call it a major issue. I'm institutionalized. I have been incarcerated the last 25 years. Doing time doesn't bother me. That's why—you know, there are statements regarding spending the rest of my life in prison, that is the reason I want to die. It is now true. I'm institutionalized. Doing time does not bother me, you know. I have done worse time in the so-called death row. It is not really an issue.

Q What is your concern in that regard? What does bother you, Mr. Lonchar?

A I'm alive, that is what bothers me.

Q Mr. Lonchar, are you presently taking any drug or medication?

A No, sir.

Q Is there anything else you would like to say to me or with regard to the proceedings here?

A No, sir.

THE COURT: Ms. Westmoreland, do you have any questions you would like to ask Mr. Lonchar?

MS. WESTMORELAND: No, Your Honor, I don't.

THE COURT: Mr. Mears? I'm sorry, I understand to [446] be consistent—

MR. MEARS: Based upon my previous—

THE COURT: It would not be appropriate.

MR. MEARS: Based upon my previous statement to the court, I decline to ask questions of Mr. Lonchar.

THE COURT: All right, Mr. Lonchar, you may step down.

(Witness excused from the stand.)

THE COURT: All right, counsel, let's take about 30 minutes. It is now about three. We will get started with your arguments at 3:30.

(Whereupon, a recess was taken.)

IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

Case No. 93CV9

HABEAS CORPUS

LARRY LONCHAR,

*Petitioner*

v.

WALTER ZANT, Warden,

*Respondent*

TRANSCRIPT OF PROCEEDINGS HEARD BEFORE  
HONORABLE KRIS COOK CONNELLY  
JUNE 23, 1994

[2] THE COURT: Good morning, ladies and gentlemen. I am Kris Cook Connelly, and I will be presiding here today in Butts County.

Mr. Lonchar, I will be the judge who will be handling this particular habeas corpus petition for you. And we are before the court this morning on Larry Grant Lonchar versus William D. Zant, Habeas Corpus No. 93V99.

Gentlemen, are you ready to proceed at this time?

MR. BAYLISS: Yes, your Honor.

MR. STAFFORD SMITH: Yes, your Honor.

THE COURT: Ms. Westmoreland, on behalf of the Attorney General's Office?

MS. WESTMORELAND: Yes, your Honor.

THE COURT: I don't believe that I need to tell counsel that we are here in perhaps a rather unusual posture. A habeas corpus petition has been filed by Mr. Lonchar with Mr. Bayliss and Mr. Clive Stafford Smith

representing him. We have various motions that are before the Court for resolution, and I am prepared to move forward and rule on those motions.

We are here today on a pretrial hearing, not an evidentiary hearing on the merits of Mr. Lonchar's [3] petition but simply to resolve pretrial issues, and frankly, to see if Mr. Lonchar wishes to go forward on this case.

Gentlemen, I have before me several letters that Mr. Lonchar has written me personally. I have a letter dated September 13, 1993, in which Mr. Lonchar informed me that he wished to fire, or relieve, his lawyers from his representation and that he did not wish to proceed further with this habeas corpus petition. I have another letter dated May 5th of this year, 1994, in which he reiterates that request.

I think the record will clearly reflect that Mr. Lonchar has made similar requests and communications to Ms. Westmoreland from the Attorney General's Office. And I think the record will reflect that Mr. Bayliss and Mr. Clive Stafford Smith are certainly aware of these letters and have been provided copies.

I think my last communication, or written communication, to all counsel in this case stated that until we had a hearing on this matter, in this matter of representation and Mr. Lonchar's wishes were resolved in court, that I considered both of [4] you gentlemen to be representing him and, of course, asked Ms. Westmoreland not to communicate with Mr. Lonchar directly.

So we are before the Court in sort of an unusual posture.

Mr. Lonchar, frankly, I need to know what you wish to do about this case, and I need to know that on the record.

MR. LONCHAR: Would you like me to go ahead and speak, your Honor?

THE COURT: Yes, sir. This is your case. It is not my case. It is not Mr. Stafford Smith's case. It's not Mr. Bayliss' case. It is not Ms. Westmoreland's case. This

action is your case, and I need know if you wish to proceed or not to proceed and what you are asking the Court for because we have gotten diverse opinions from you.

MR. STAFFORD SMITH: Your Honor, if I may, before we go ahead with that, how would you like to proceed on this? Is it okay if we do this all sitting down, or would you like us to stand at each juncture, whatever your preference?

THE COURT: You can stand if you are addressing the court, but I am a lot more concerned about [5] substance than formalities.

MR. STAFFORD SMITH: Thank you, Judge.

THE COURT: We have a witness stand. We can have Mr. Lonchar take the stand and be sworn. I think I would prefer that because we do have an affidavit from him on file.

MR. STAFFORD SMITH: Well, that's right. And the defense objection, of course, is which is the horse and which is the cart. Our position is that until a hearing can be held on whether Mr. Lonchar is competent to forego his appeals, then he shouldn't be presumed to be competent to get up and voluntarily waive it. And so we would object to him being sworn and being put on the stand absent a hearing. We would at some point in time, we'd be happy to do it now or at the Court's convenience, like to just talk a little bit about the course of this case because I don't dispute that that is what the Court has received, and I'd like them marked and put in evidence, if we could, as Court's 1 and 2. But I would like to discuss some of the other matters that have come up in this case over the last couple of years.

THE COURT: I assume, Ms. Westmoreland, you [6] disagree with counsel for Mr. Lonchar as to his competency to testify?

MS. WESTMORELAND: Absolutely, your Honor. Mr. Lonchar has been found competent by four separate courts and should be presumed to be competent at this point in time and should be presumed to be able to make the decision to do what he wants to.



And I think, with all due respect to Mr. Stafford Smith, if Mr. Lonchar wants to dismiss that petition I think that should be the very first inquiry of the Court. And we get into the question of whether Mr. Stafford Smith is even representing Mr. Lonchar and whether there is anything to be said further in this case.

I think he is certainly competent to take the stand and to make a determination and to advise the Court of what his own wishes are in this matter.

THE COURT: I agree with Ms. Westmoreland in that regard. Mr. Lonchar has been declared competent by several courts of several different jurisdictions. And I am going to allow him to testify and to inform me as to his particular wishes in regard to this matter. But if you want to have an opportunity before we proceed to that to orient me [7] to the case or present anything further to me in the nature of an opening or request, I will be happy to do that and then give Ms. Westmoreland an opportunity.

I am sure you have a copy, sir, of the prehearing brief on behalf of respondent that was forwarded to me.

MR. STAFFORD SMITH: That's right.

THE COURT: Which is probably exactly in the nature that you would like to address me from your position. This case has a lengthy history prior to my entrance into it, and I will be happy to hear from counsel for both parties in that regard.

MR. STAFFORD SMITH: Thank you, Judge. And I will say that I received this only this morning. I do think there are some legal issues that do need briefing. The first, of course, is what the significance of the prior hearings on competency have. This is off the top of my head since we haven't briefed this directly. In *Smith v. Armontrout*, I believe that is the case, the Eighth Circuit held that a competency hearing that was one or two years old in that case was not sufficient as a matter of competency and that a *de novo* hearing [8] should be held.

There are some reasons in this case why this should be, and to be perfectly honest, I am in a difficult position.

And I anticipated that Mr. Mears would be here today, he should be here at any point, because I think that Steve Bayliss and I are here representing Larry as his lawyers on the merits of this petition. And as happened last time, I had to be a witness on the question of competency. And, certainly, I don't feel comfortable raising the question of his competency substantively. But let's just go over the facts as they happened in this case.

Mr. Lonchar did object previously to the filing of a petition, and we got down to within 30 minutes, 32 minutes I think it was, of the scheduled execution date on February 24, 1993. And at that point Mr. Lonchar agreed to go forward with his appeals. It is a very difficult thing.

Our allegations then and our allegations now are that the reason that Mr. Lonchar doesn't want to go forward with his appeals, and I want to state for the record that it is my opinion that he would categorically win on habeas corpus appeal. I think [9] there are two issues that he wins more dramatically on, one of which the Eleventh Circuit has explicitly ruled that in a capital case you simply cannot waive your presence at a capital trial. As the law stands now, that is automatically going to reverse this case.

The second is there is a clear violation of the right to effective counsel on appeal regarding an issue that would automatically reverse, at least the penalty phase of this case if nothing else, under *Quick v. State*. The merits of that petition are rather relevant because Mr. Lonchar did agree to go forward on the 24th of February, 1993, and then he later changed his mind and refused to cooperate with the appeal.

In the meantime, going through various evidences, I believe, of mistreatment that he suffered down there at the Diagnostic Center, including an effort in the middle of May, I think of last year, to take his own life. These indications are enough, the indications of someone who is logically giving up appeals for no rational reasons.

Indeed, our position is that Mr. Lonchar, were he consistently receiving the assistance he needs [10] down there and receiving constitutional conditions in the prison, would not want to forego his appeals. And that being the case, you have got not only the question of his competency to appeal but the voluntariness of the decision to waive appeals which, I believe, is the second prong of the analysis in foregoing a petition.

It is our position that the Court can't dismiss the petition without finding not only, as a matter of fact that he is competent, but also as a matter of fact that it is a voluntary waiver of pursuing this petition. And in that context I don't think that can be done without on evidentiary hearing.

There have been various other things that have been stated between myself and Mr. Lonchar and Mr. Bayliss which I am not sure I feel comfortable saying in front of the Court in light of privilege. I don't know what my position is in terms of stuff that Larry has said to us as to negotiations as to how we would proceed on this appeal because I think that is privileged. The question becomes when does it become waived? When do you waive the privilege in terms of us being able to make a showing as to why we believe he is incompetent?

[11] That is, again, a very, very tricky question. The last time this came up I was put as a witness on the stand by Mr. Mears, who was representing Ms. Kellog. And quite frankly, I invoked attorney-client privilege, and it is my position that Mr. Lonchar can't waive it unless he is competent. And the very tricky question comes up as to who makes that decision, how it is made?

Let me give a hypothetical. Let's say, for example, and I am not saying this is the facts of the matter, but let's say that Mr. Lonchar has made statements to me that indicate to me a real vacillation on this question of whether he lives or dies, vis a vis the actual facts of this case, the actual facts of the crime charged against him. Then where does that put me in terms of what I am

allowed to reveal and am not allowed to reveal to the Court. I think we could do it in chambers perhaps, but I am certainly not prepared to do it in open court. I am not prepared to state confidential communications between me and my client.

I will state for the record that I think that the reason that Mr. Lonchar is doing this is not from a voluntary decision that he wants to meet his [12] maker. It is from a coercive aspect of how he is being treated in the Georgia prison system. I am convinced that he wouldn't want to do it if he weren't being mistreated out there. In that context, I don't think that is a voluntary waiver. This is something that we have struggled with, how we can go about proving that in the context of attorney client privilege.

THE COURT: I deem you and Mr. Bayliss to be his lawyers right now, and you are under my order to that effect. Mr. Lonchar is receiving counseling and therapy; is he not?

MR. STAFFORD SMITH: Well, I think there is factual discussion on that. He is receiving visitation from Dr. Herrington, who we arranged to have see him. There is another question of medication. The broader question is simply the treatment he receives in the prison, which I don't think Mr. Lonchar is ever going to say, if he gets the opportunity to say, that it is a holiday camp over there at the Diagnostic Center where they treat him as decently as they would treat him in some other institutions. That, to me, is one of the cruxes of this issue. [13] Where I need guidance really, your Honor, is what my latitude is in revelations of privileged communication.

THE COURT: We are here today to determine whether or not he wishes to proceed with this hearing. From the record and from what I have seen, I am going to allow him to speak to that. I will be willing to hear any evidence that either of you gentlemen want to put before me to make that consideration.



MR. STAFFORD SMITH: We would agree on two things. Number one is that if he takes the stand and says that he doesn't want to proceed with these proceedings, that that could result in his death, and therefore, presumably, he is waiving constitutional rights of the moment. That means that there has to be a voluntary waiver of those rights before it can be done; right?

MS. WESTMORELAND: Your Honor, this is exactly the question that we have had litigated before. The Eleventh Circuit Court of Appeals ruled it was voluntary. This whole question of treatment was raised for the first time at the conclusion of the federal district court proceedings. There has never [14] been any 1983 litigation filed challenging his treatment. There has never been any evidence presented that he has been denied medical treatment, denied psychiatric treatment. There is no evidence to that effect, in any court record, ever been presented.

The question of voluntary waiver, we wouldn't be asking all of these questions if this weren't a death penalty case. I think we all agree with that. If this were a normal habeas case, the inmate writes a letter and says I want to dismiss my petition. The Court would dismiss the petition.

Now, Mr. Lonchar's competency only comes—

THE COURT: —I wouldn't over a letter, Ms. Westmoreland.

MS. WESTMORELAND: Well, not a letter but a motion, certainly. I don't think we would be getting into the same issues. And I am not saying we shouldn't, obviously. But the question of competency only comes into play when we are talking about standing of the next friend to proceed on Mr. Lonchar's behalf. That is the whole issue of competency. That is the way it was litigated previously, was whether his sister had standing to [15] litigate in his behalf when he didn't want the litigation to proceed. That was the whole question.

Habeas corpus is a postconviction civil proceeding, civil type proceeding. We are not talking about a waiver of a trial. We are not talking about a waiver of a direct appeal. We are talking about does he want to dismiss a habeas corpus action and choose not to proceed in this matter.

And I don't think there is anything that the Court needs to do other than ask Mr. Lonchar if he wants to do that. If Mr. Lonchar wants to tell the Court that there is something coercive, that there some treatment that is coercing him or someone is coercing him to make that decision, he certainly may do so. There is absolutely no retribution that is going to happen to him for making that kind of statement to the Court. This is the perfect opportunity to do that.

But I think the inquiry at this point in time is simply Mr. Lonchar's wishes and have the Court take that inquiry at this point.

MR. STAFFORD SMITH: Your Honor, if I may differ with that.

[16] Obviously, the whole question in *Whitmore v. Arkansas*, and the whole question of voluntariness of post conviction proceedings and the waiver of post conviction proceedings indicates that there has to be a voluntary waiver of the right to proceed on post conviction proceedings. Now, that doesn't matter whether it is raised by next friend or whether Mr. Lonchar is the one who is saying I want to forego it. It has to be the voluntary waiver of those proceedings. Just to give you a hypothetical which illustrates how obvious that is, let's say over at the prison that he has filed a post conviction proceeding of the prison beating him until he agrees to drop it, then clearly that is an invalid waiver of his post conviction proceedings.

It is just the same here today. I am saying, it is our allegation, Mr. Bayliss' and mine, on behalf of Mr. Lonchar, that this is a not a voluntary waiver of post conviction proceedings. And unless there is a hearing to establish that, I don't think he can do it.

THE COURT: Well, you see, Mr. Stafford Smith, we are here today to do that, and what you are presenting to me is speculation. I don't know if [17] they are beating him over there, but I can't assume that they are and I can't consider that. Unless he tells me that there is some reason why he cannot make this decision himself, I firmly believe that this gentlemen is capable of making that decision, even if it may not be in agreement with his counsel.

We have clients who disagree with us as lawyers all the time and don't take our advice, even though we think it may be good and correct, and it may be. There may be very serious merits to this case, but I can't speculate as to that, either. That is not what we are here to determine today.

MS. SMITH: That is a key issue though, Judge, and we don't have to speculate to it because it is absolutely clear on the record that there are merits to this case. So the question then becomes whether you are going to say, you can presume that someone who is effectively committing suicide in the face of the opportunity to proceed is capable of doing that. I think that is an Almighty presumption, and I am not sure the burden of proof on that is on us.

THE COURT: I think that is a philosophical issue and a personal issue and not necessarily a legal one, as you have framed it.

[18] Do you want an opportunity to consult?

MR. STAFFORD SMITH: We object to any testimony.

THE COURT: I understand that, but in light of the letters that Mr. Lonchar has directed to the Court and to Ms. Westmoreland, I feel that I am going to have to call him as a witness and determine his regards in this matter.

I appreciate the tenacity of counsel and the quality of representation that Mr. Lonchar is getting in this matter.

Anything further, Ms. Westmoreland?

MS. WESTMORELAND: No, your Honor, not at this time.

THE COURT: Mr. Lonchar, I will call you as a Court witness, please, sir.

[LARRY GRANT LONCHAR, having been duly sworn, was examined and testified as follows:]

THE COURT: You need to speak up so the court reporter can take down your comments, so your attorneys can hear what you are saying, so Ms. Westmoreland can hear you, and so I can hear you.

[19] EXAMINATION BY THE COURT:

Q State your name for the record, please, sir.

A Larry Grant Lonchar.

Q Mr. Lonchar, do you know what we are doing here today?

A Yes, ma'am.

Q All right. Do you understand that you are before the Court today because you with these two gentlemen have filed before me this application for writ of habeas corpus?

A Yes.

Q And do you understand, of course, that you have written letters to Ms. Westmoreland?

A That's correct.

Q And you have written several letters to me as the Judge assigned to this case; have you not?

A That's correct.

Q Mr. Lonchar, do you want to proceed with this case?

A No, your Honor. I realize I made a mistake on February 24th. There is a few reasons why I stopped it 30 minutes before my execution, and those reasons I have now resolved. Like I said, I made a mistake on February 24th. I am not trying to manipulate the judicial system. I assure this Court that I won't stop it again. This is all



[20] voluntarily. I am not being mistreated at the Diagnostic Center. As a matter of fact, I see a psychiatrist once a month, and I see a psychologist twice a month, and I am under medication, antidepressant medication, for the last year. Hey, I feel great. I wish I had felt this great years ago.

So there is no doubt about the issue of this being voluntarily or me being competent, you know. This is nothing but a stall tactic on the lawyers' part trying to stall this regarding am I competent. Like the record shows, I have already been ruled competent by four courts.

I am asking the Court to dismiss this petition. Like I say, I signed it. It really upset me to sign it, but I was more or less pressured into signing it. I have been trying for quite while to withdraw this. I really don't see why it shouldn't be. The issue of me being competent has already been decided. Like he is saying I am being mistreated by the prison, I am not.

I am asking the Court to dismiss this petition.

Q Mr. Lonchar, no September 13, 1993, after I was assigned to this case, you wrote me a letter and asked me to relieve Mr. Bayliss and Mr. Stafford Smith and even Mr. Mears, who was your prior lawyer, from representing you any further. I did not grant that by your letter. [21] What are your wishes in regard to that?

A Sure, that is correct, yes. Like I say, I have no faith in these lawyers. They are not representing me. What they are trying to do is against my wishes. They have told me many lies. I don't even have any conversations with them anymore. I don't trust them.

No, they don't represent me. I don't recognize them as my attorneys, never have. They represented my sister, Ms. Kellogg. I know I was pressured into signing this petition on February 24th.

Q Do you understand that your lawyers feel that if you proceed with this habeas corpus petition that you may prevail, that you may win?

A Yes, your Honor.

Q That they feel that they have real legal issues, not made up or pulled out of the air issues but real legal issues, that a judge would consider and perhaps rule in your favor on?

A Yes, I realize that, but there is still three people dead which can't be reversed. I don't see myself winning.

Q All right, Mr. Lonchar, on May 5 of this year, 1994, you wrote me and again asked that you be allowed to dismiss this petition. Do you remember writing me that [22] letter?

A Yes, ma'am.

Q What are your wishes in regard to that today?

A Like I stated earlier, yes, I do wish to dismiss this petition.

Q Has anybody tried to talk you into dismissing it?

A Oh, no. I did not—I mean, they had to send a doctor back there on the night, you know, when I did sign this petition, when I stopped my execution. I was very upset. I did not want to stop it, but I was under so much pressure, told a few things, you know. So that is the reason I stopped it, and I realize now that I made a mistake.

I assure this Court I am not trying to manipulate the system here. I am not going to stop it again. I have been sentenced to death. All I am asking is that the sentence be carried out.

THE COURT: Counsel, do you have any questions?

MR. STAFFORD SMITH: Your Honor, we object to this whole thing.

THE COURT: I understand you object to the entire proceeding and the manner of procedure the Court is following.

MS. WESTMORELAND: If I may just a moment, your [23] Honor.

## EXAMINATION BY MS. WESTMORELAND:

Q Mr. Lonchar, you have had a chance to talk with Mr. Stafford Smith and Mr. Bayliss this morning; is that correct?

A Yes.

Q So you have a chance to consult with them about representing you or about proceeding with this action; is that correct?

A Yes.

Q Has anybody ever prevented you from consulting with counsel about this case?

A No, ma'am.

Q Has anybody ever denied you medical treatment at the institution?

A No, ma'am. Like I stated, I am under treatment now. I have been for over a year, been taking antidepressant medication. Like I stated, I wish I was taking it years ago. I am sure I wouldn't be here now. I see a psychologist every other week, and I see the psychiatrist once a month. So no, regarding my treatment.

Q Do you understand that if the Court dismisses this petition, that if you changed your mind again that it [24] might interfere with your filing another state habeas corpus petition?

A You don't have to worry about me changing my mind again, I assure you.

MS. WESTMORELAND: I don't have any questions further, your Honor.

THE COURT: Do you understand that if I dismiss this petition, if you get upset 30 minutes before the next time that there might not be anything you can do about it?

MR. LONCHAR: That is correct. You can take that right away. They arranged the telephone call with the lawyers, that's how this was—I am not going to accept it. There is nothing to even talk about with the lawyers.

THE COURT: Is there anything else you want to say to me about this, Mr. Lonchar, or any further requests

MR. LONCHAR: Yes, just that you dismiss it and lift the stay of execution so another date can be scheduled.

THE COURT: Anything further?

MS. WESTMORELAND: Nothing further, your Honor.

MR. STAFFORD SMITH: Your Honor, we would [25] request an opportunity to ask Mr. Lonchar some questions in camera where there would be no waiver of his attorney-client privilege.

MS. WESTMORELAND: Your Honor, I think everything has got to be done on the—I understand Mr. Stafford Smith's concern about attorney-client privilege, and I certainly appreciate that question, but I certainly think we have got to be on the record in this case. Whether it is in chambers or in open court, I am not sure that is a big issue, but I don't see that we can do anything except on the record and perfect the record in this matter because we can't be in a position later on of having had an in camera conference or something along those lines to raise some questions about this matter.

I think we are talking about something that is obviously a very serious matter, and whatever is said has to be said on the record in this case.

THE COURT: I agree, Counsel. It is going to have to be on the record. And I really don't understand the basis of the problem with the request.

MS. STAFFORD SMITH: Okay, let's say, for example, you were appointed counsel. Then you would [26] do that ex parte without the State being present because it is none of the State's business. Now, the same goes for certain matters when you are taking counsel off. There are certain things Mr. Lonchar said that I would certainly dispute. There are certain statements he has made about the facts of this case that I can't reveal to the State that



I think are important. Otherwise, we would request the right to file a sealed proffer in the record as to what we would expect to prove.

THE COURT: I am not going to do anything off the record.

MR. STAFFORD SMITH: It would be on the record, but it's just the State has no right to be present, nor does anyone else, except for your Honor.

MS. WESTMORELAND: I would object to being excluded from the proceedings. I understand, again, the attorney-client privilege. If we want to make some agreement of not using those statements in some subsequent proceeding, if that is an issue.

We are talking a habeas corpus proceeding and whether Mr. Lonchar can dismiss that proceeding. That is the sole issue here. And I think that I have as much right to know why it is being dismissed or [27] not being dismissed in this instance. We are not talking about a pretrial motion trying to obtain experts or anything along those lines.

I would oppose it, your Honor.

MR. STAFFORD SMITH: I think I could be disbarred if I waived the attorney-client privilege. The Code of Professional Responsibility says I can only do it in terms of silly things like fees litigation. But I can't do it now. I can't just say, hey, I'm waiving his privilege.

THE COURT: I don't guess I see the problem, Mr. Stafford Smith. What we are talking about right now is simply what he wants to do. And he has a right to express that. If you want to ask him about that and about his testimony here today, I really don't see any problem with it.

MR. STAFFORD SMITH: Let me give you a hypothetical. And again, this is not the facts of this case but analogous to some other matters.

Let's say, for example, that Mr. Lonchar and I had a conversation down at the jail last week where he said, no, this is all a ruse, or whatever. That is not the facts,

I emphasize, of this case. In that context I am not allowed to say that here in court, [28] and I don't think I could ask him questions about that here in open court.

Now, the actual facts of this case are very different from that, but something that I think we need at least to be allowed to make a sealed ex parte proffer on what we expect that our case would prove.

MS. WESTMORELAND: Your Honor, I guess my concern gets back to, again, and I have no idea what Mr. Stafford Smith is talking about, obviously.

THE COURT: Well, that's the problem. I don't either.

MR. STAFFORD SMITH: That's the whole point.

MS. WESTMORELAND: In getting back to hypotheticals again, we are talking about, for example, allegations of treatment at the prison. If we are going to talk about whether the treatment at the prison is proper, I certainly have a right to know that that is the allegation. And if the Court is going to consider evidence on it, then I have got a right to bring in evidence from the prison to show what has been done, based on the prison records and to make that kind of an establishment on the record.

And again, we are all sort of in the—I don't [29] know what it is that can't be asked of Mr. Lonchar on the witness stand, and again, I appreciate Mr. Stafford Smith's position with the attorney client privilege and I know he is in an awkward position. But I also would strenuously object to anything being done not on the record and in open court.

And if I may, I need to add one more statement to that, Mr. Stafford Smith pointed out that he was called as a witness at the last proceeding, and the problem was Mr. Stafford Smith would not agree for Mr. Lonchar to even say whether he would waive the attorney-client privilege because Mr. Stafford Smith took the position Mr. Lonchar wasn't competent to make that waiver of the attorney-client privilege. So we have got a complicated

circle that we were in at the last hearing and we are in at this hearing, as well.

MR. STAFFORD SMITH: That is right, and that is exactly the position and that is why it has to be done *ex parte*.

THE COURT: I am not going to do that, Mr. Stafford Smith, so if you want to question him now, you may.

MS. SMITH: No, your Honor. I object to that [30] whole proceeding, and we will file a sealed proffer.

THE COURT: Anything further?

MS. WESTMORELAND: No, your Honor, we just ask the Court to grant Mr. Lonchar's request and dismiss the petition. We would ask that the petition be dismissed with prejudice.

THE COURT: You may step down, Mr. Lonchar.

MR. STAFFORD SMITH: If I may respond to what the State said at the last minute there, with prejudice. I think that is an Almighty step to take because, of course, if we then were to bring a next friend petition, and I would note for the record that Mr. Lonchar's brother, Mylon Lonchar, Jr., is present in court, as now is Mr. Mears.

If a next friend petition were to be brought and Mr. Lonchar were found to be incompetent, then obviously nothing that were done at this hearing could be with prejudice.

I don't think the Court should be dismissing this at all without a competency hearing, but if it is going to be done I don't see how it could be done with prejudice so that he could never bring another habeas corpus as an initial proceeding. In terms of procedural default and the consequences of that, [31] what that would mean would be that any subsequent petition that Mr. Lonchar would bring, everything would be a successive habeas petition, and therefore you couldn't reach the merits of it unless, of course, the prejudice were for it having been dismissed the first time around and not having brought it properly the first time.

I don't think that is appropriate where we are dealing with issues here of the question of competence, and I would request of the State to cite any authority whatsoever to the Court in support of that position that this should be with prejudice.

MS. WESTMORELAND: Your Honor, I would certainly agree that if we somehow have a next friend suit that is filed and if there is some determination by a next friend litigation that Mr. Lonchar is not competent, that is a different question.

My position on the with prejudice issue is so that Mr. Lonchar, himself, cannot change his mind and bring another state habeas corpus petition on his own.

Next friend litigation involving the competency question matter is a different matter.

[32] THE COURT: The issues in that petition would be very different.

MS. WESTMORELAND: I think that would be a whole different question. And I think if the question of next friend standing arose, if it were shown that he were incompetent, then the question of with prejudice in this proceeding, I think, would go out the window and I wouldn't even raise the issue at that point in time. And I will state on the record to this Court that if we ever got to a point of next friend standing litigation, if it were found that Mr. Lonchar were not competent, the next friend could proceed in the state habeas corpus petition. I am not going to raise the dismissal of this petition as a procedural bar in that case.

I would like to be able to raise the dismissal of this petition as a procedural bar should Mr. Lonchar himself decide to proceed with another state habeas petition. That is where I am asking for the with prejudice.

MR. STAFFORD SMITH: And I think that is inappropriate for this reason. There has been no finding of competency today. There has been no competency hearing to establish Mr. Lonchar's [35] competence to do



all this. There has been no hearing on voluntariness of waiver, as we would request. In that context, if there were a hearing and he were found incompetent to proceed and there was a next friend petition, and then at some subsequent moment he were competent again, then under Ms. Westmoreland's argument when he became competent it will get dismissed because he would then be on his own standing. And the issues are going to be identical. The substantive issues in the petitions are going to be identical today as they would be in the next friend petition, as they would be in a subsequent petition. The only difference would be the litigation of the competency and the voluntariness.

All the underlying issues would be the same, and what the State is asking for is for those to be procedurally defaulted at any time when Mr. Lonchar is competent, and I don't think that is fair. And I don't know of any authority that allows for that.

THE COURT: Anything further?

MS. WESTMORELAND: Nothing further, your Honor.

THE COURT: Y'all have stumped me on the with prejudice. I am going to have to look at that. I [34] will look at that before I make a ruling.

MS. WESTMORELAND: If I may, your Honor, my only concern is that we don't get to the exact same position we did the last time, and that 30 minutes before a scheduled execution we can come back and start all over again, and we have added another several years to the litigation. And I understand Mr. Lonchar says he is not going to do that. I do understand that, and I understand his position.

THE COURT: I tried to make it perfectly clear when I was speaking with Mr. Lonchar that I consider this to be a final resolution of this now, before this particular Court. And I am functioning that he understood that.

MR. STAFFORD SMITH: Can I ask the Court though, I think it is significant to ask what would happen if Mr. Lonchar changed his mind and wanted to proceed with his constitutional rights at the point when his execution was pending? He may not feel the same, and then at point they can just go ahead and do it.

MS. WESTMORELAND: I think he has got a federal corpus remedy, the same as any other petitioner would have, and that would be the next stage of the [35] litigation. Even if we reached the merits in this case and if the respondent prevailed, then that would be the next logical step in any event. And that is the exact next step that we proceed in that case.

MR. STAFFORD SMITH: And I don't want to put words in the State's mouth, but I know what the State will be arguing in federal court. They are going to be arguing that all substantive issues in the case, except those raised on direct appeal, are procedurally defaulted because as of this moment under the ruling by this Court, that would procedurally default every issue before the Court if it even hadn't been raised. And I don't think we have exhausted them under the State's theory, so there would be no further litigation, and Mr. Lonchar would be dead.

MS. WESTMORELAND: Your Honor, to dispute Mr. Stafford Smith's theory on federal habeas corpus litigation, first of all, the federal court can litigate all issues raised on direct appeal. Secondly, the federal court can look at cause and prejudice to determine if there was cause to excuse any procedural bar. If they can prove that he was [36] incompetent at this time to make the waiver, then that is cause. And that could very well excuse any procedural bar.

This is entirely too hypothetical.

THE COURT: I think that is getting a little speculative for me. When I left this morning I was not on the federal bench, and I don't think anything has happened in my absence. And I am not in the position to advise Mr. Lonchar.

MS. SMITH: Could we brief this, Judge?

THE COURT: I am going to rule on this matter. I am going to accept Mr. Lonchar's request. I will dismiss his petition. I have not considered the with or without prejudice of this matter. I am going to go back to my office and do some research on it, on that brief issue. I will be happy to hear from you. I will give you seven days, and I will give her seven days to respond. And then I want to get an order out.

All we are talking about is with or without prejudice.

MS. WESTMORELAND: That's all.

THE COURT: Mr. Lonchar, this is your case. Do you understand what I am saying?

[37] MR. LONCHAR: Yes your, Honor, I would like to just make one more point here in regard to my brother, next of friend. I have three brothers and a sister. We have gone through my sister. Are we going to start on this next friend by all my brothers? I mean, this is nothing but a stalling tactic by the lawyers here. I just hope the Court doesn't accept their next of friend petitions.

THE COURT: Well, Mr. Lonchar, I don't know if another petition will be filed on your behalf or not. I don't know if it would come before me or before another Superior Court Judge. We rotate these cases. I have no way of knowing that. But that is something that you will have to discuss that with your family and not with the Court. That is not before me.

The only thing that is before me today is your request, and I am granting that request.

MS. WESTMORELAND: Your Honor, since the petition would be dismissed I don't think it is necessary, but there is a stay of execution that was entered by Judge Craig in this proceeding, and I would think it would be appropriate at the time of the dismissal to vacate the stay of execution as [38] well.

THE COURT: Yes, I agree.

Mr. Stafford Smith and Mr. Bayliss, you have seven days if you want to get me something on this one issue of the effect of the order, of the effect of the magnitude of the order, and then you will have seven to respond.

MS. WESTMORELAND: Your Honor, if I might get, and I hate to keep raising issues, I guess for my clarification, Mr. Lonchar, I think, hasn't written me in a while once we clarified that the Court was considering Mr. Stafford Smith and Mr. Bayliss to still be his counsel, and I think we need some clarification for the record. It has put me in an awkward position.

THE COURT: I understand that. I will state for the record that all counsel have acted extremely professionally in that regard and sought guidance from the Court, and you have, Ms. Westmoreland.

Mr. Lonchar has written me, and he has under oath today asked that these gentlemen be relieved as his lawyers. And pursuant to this hearing, I don't consider them to be representing him in this matter.

Right now I don't think Mr. Lonchar has a legal [39] matter. I am dismissing this action before the Court.

Anything further?

MS. WESTMORELAND: Nothing for the respondent, your Honor.

MR. STAFFORD SMITH: Your Honor, we would just request this if it is suitable with Larry.

We may not be officially his lawyers in the courthouse, but we don't want that to affect the rights of the people who visit him down at the prison.

MS. WESTMORELAND: He can add somebody to his visitors list if he wants to, or he can request that they be allowed to visit him.

THE COURT: I assume that is up to him and the prison, not me.

MR. STAFFORD SMITH: He has made it clear that while we may not be representing him in this that we can be on his attorney list.



THE COURT: I didn't say you can't go see him. Not at all. I think that is one more matter that is up to Mr. Lonchar. Anything further?

MS. WESTMORELAND: That's all. Thank you.

THE COURT: All right, Court stands adjourned.

IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

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Civil Action # [95-V-328]

MILAN LONCHAR, JR.,  
as next friend to LARRY GRANT LONCHAR,  
*Petitioner*

vs.

A.G. THOMAS, Warden,  
Georgia Diagnostic and Classification Center,  
*Respondent*

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In Open Court Before Honorable E. Byron Smith,  
Judge, Superior Courts  
Flint Judicial Circuit

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TRANSCRIPT OF PROCEEDINGS HELD IN  
MONROE SUPERIOR COURT ON JUNE 21, 1995  
BEFORE JUDGE E. BYRON SMITH

\* \* \* \*

[3] Mr. Matteson, let me ask you, in what capacity do you represent Mr. Lonchar?

MR. MATTESON: Well, I guess in all capacities, really, to get him timely executed.

THE COURT: Do you intend to offer him as a witness, or is he going to make any statement, or are you going to make a statement on his behalf?

MR. MATTESON: No, Your Honor, we are not going to contest it.

THE COURT: Ms. Smith and Ms. Westmoreland, you are obviously here on behalf of the State; is that right?

MS. WESTMORELAND: That's correct, Your Honor.

MR. MEARS: Your Honor, may I make a statement?

THE COURT: Yes, sir.

MR. MEARS: It is my understanding, based upon my conversation with Mr. Matteson, with regard to the immediate matter before the Court, which is a motion for an order allowing for a psychological evaluation, it is my understanding that Mr. Matteson, on behalf of Mr. Lonchar, is joining in that motion.

THE COURT: Well, he didn't say that.

MR. MATTESON: Well, I didn't realize that issue was before the Court. That is correct, Your Honor.

THE COURT: I'm not arguing with you. I just [4] asked you in what capacity you represented him. So let me let you restate that. If you do join in that motion, then that needs to go in the record.

MR. MATTESON: I join in the motion concerning adopting this Habeas Corpus Petition. We are not participating in it, but we will adopt the motion.

THE COURT: The Habeas Corpus Petition is actually, wherein it concerns your client, was not brought by you, so I don't think you have any part or standing to make a statement in that regard either.

MR. MATTESON: I understand that, Your Honor. Out of an abundance of caution, we will adopt it.

THE COURT: Then the Court has two matters to hear this morning. The first and foremost, I assume, is the motion for a psychological examination.

MS. WESTMORELAND: Your Honor, actually, from our perspective, the preliminary matter is, first of all, we object to the in forma pauperis request by Mr. Milan Lonchar, as we stated in our pleadings this morning to the Court. And second of all, we assert that before the Court can even consider the motion for access for a psychological evaluation, the Court has to conclude that Mr. Milan Lonchar has standing to bring this action at all. If he doesn't, then there is absolutely nothing that can be done in this [5] case. And we would also submit

that I don't think that it is appropriate, I don't even know—if Mr. Larry Lonchar and his counsel are not joining in the Petition, I find it hard to see how they can join in the motion without joining in the Petition itself. If they don't oppose it, that is one thing, but actually to join it is a whole different matter.

Again, as I said, we do oppose the request to proceed in forma pauperis. As Mr. Milan Lonchar states in his affidavit, he makes \$259.00 a week. I understand the filing fee is \$85.00. This is not an inmate on death row we are talking about, this is a private citizen who is certainly capable of paying the filing fees in this case.

THE COURT: The Court has a policy in the circuit usually in these cases, I haven't imposed it certainly in a case of this nature, but in divorce cases, I will not sign a decree unless the Court finds as a matter of law that the person is in forma pauperis.

MR. MEARS: Your Honor, we will address that at the Court's direction. If the Court finds that after we've put forth a statement as to Mr. Milan Lonchar's financial ability to proceed in this case on his own, in the event the Court finds that he is not legally [6] capable of proceeding in forma pauperis, then we will try to make arrangements to pay whatever fees are required of him so that whatever the Court determines on that issue is certainly something the Court would have to determine and we would not let that delay the proceedings here today.

THE COURT: The execution in this case is set for between Thursday and Sunday?

MS. WESTMORELAND: The execution window begins this Friday at noon, and the commissioner has set the time for 3:00 p.m. Friday afternoon at this point, Your Honor.

(WHEREUPON, there was a brief delay, after which the following transpired:)

THE COURT: Mr. Mears, your client has a right to file this. I will hear from you on that, and then I will hear from Ms. Westmoreland in response.



MR. MEARS: Your Honor, as succinctly as I can put it, Milan Lonchar is Larry Lonchar's older brother. At 3:00 o'clock on Friday, the State of Georgia intends to execute him.

Milan feels that his brother is not competent to understand the nature of the withdrawal of his appeals. He has never had a full and fair hearing in the State Habeas or Federal Habeas proceedings with [7] regard to the facts of the case in his actual trial.

Larry Lonchar has consistently waived his appeals and then reinstated his appeals over the past several years.

Milan Lonchar is asking this Court to allow him to proceed as next friend and ask that a evaluation be made of Larry for his competency.

Now, Judge, there have been competency evaluations, as you know from the pleadings. There was a three-day hearing in Federal Court back several years ago. However, the last evaluation has become stale, according to Dr. Davis who is a psychiatrist, who actually testified on behalf of the State in the Federal Habeas. Dr. Davis has submitted an affidavit opining that there should be another evaluation.

Dr. Dennis Herendeen who is a psychologist from Douglasville, who has been visiting Larry over a period of time as a counselor and rendering psychotherapy to him up at the prison has rendered an affidavit stating that, in his opinion, a competency hearing is mandated because of his observations of Larry. He has not been given an opportunity to do a full-scale evaluation and to render an opinion as to his competency based upon the professional standards in the psychological field.

[8] Milan Lonchar is asking this Court to allow him to proceed because Larry will not proceed on his own. His attorney, I assume following Mr. Larry Lonchar's directive, has refused to follow in and file a Habeas Petition.

Milan is trying to keep his brother from being executed because he sincerely believes that his brother is not competent at this point to waive his appeals. Although that

issue has been dealt with in the Federal Courts, and I'm sure Ms. Westmoreland will point that out to the Court, there has been a certain amount of time past.

The Court may or may not be aware that Larry Lonchar came within about 30 minutes of being executed back in February of 1993.

As part of his illness, we would assert, this up and down, this high and low feelings that he has, he reinstated his appeals 30 minutes before he was to be executed.

Soon after the appeals were filed, the State Habeas proceeding began, Judge Connelly was appointed to hear the case, Larry suddenly changed his mind again and withdrew his appeals and said he wants to die.

In the middle of all of this, Mr. Lonchar has [9] contacted or been contacted by Dr. Kervorkian and wants to donate his organs to six individuals who could take his liver and kidneys and things like that.

All of that, Your Honor, has raised in Milan Lonchar's mind, and has continually, that his brother needs to be evaluated because he feels that his brother should not be executed without an evaluation.

We can't do that unless he is first, as Ms. Westmoreland points out, unless he is recognized as someone who has standing as a next friend to proceed. There is no one else who will proceed on his behalf.

THE COURT: Let me ask you this. Didn't his sister file something, I read in here, didn't she at some previous time file a next-friend petition for Habeas Corpus on his behalf?

MR. MEARS: Yes, Your Honor.

When we first started the proceeding just before Larry—I'm saying Larry and Milan, not out of disrespect because it keeps the brothers separated.

THE COURT: I understand.

MR. MEARS: Shortly before Larry's first scheduled execution, a petition was filed as a next friend on behalf of Larry by Chris Lonchar Kellogg, [10] she lives in

Battle Creek, Michigan. She was the next friend throughout that State proceeding, then into the Federal proceeding. She is in Battle Creek, Michigan. Milan lives in the Atlanta area, in Jonesboro. He is now stepping forward and becoming the next friend. The difference being, in essence, the distance that Chris would have to travel to come back and forth for these hearings.

**THE COURT:** I was under the impression, and correct me if I'm wrong, that Habeas Corpus Petition was taken to a final conclusion filed by Ms. Kellogg; am I not correct?

**MR. MEARS:** That is correct, Your Honor.

We had a hearing before Judge Camp in Federal Court. I think the hearing lasted three or four days and witnesses were—a full record was made at that point. There was a finding by Judge Camp that although Larry suffers from depression and there was a big issue of whether it was severe depression or moderate depression or these other terms that the psychologists and psychiatrists were using, he finally entered an order that found that Larry was competent.

The issue being whether he was competent to understand the nature of withdrawing his appeals. It [11] is not an insanity issue. It is an competency issue. That order by Judge Camp was appealed to the 11th Circuit Court of Appeals, oral arguments, briefs were filed there. The 11th Circuit upheld Judge Camp's ruling and the United States Supreme Court denied a Writ of Certiorari on that issue.

After those proceedings took place, the State again sought an execution date and Judge Castellani issued another execution warrant. It was that time that brought us up to the February of 1993 incident where Larry withdrew his—excuse me, it was after that period of time that we come back down to where we are now, that Larry reinstituted his appeals, has withdrawn the appeals, and we are back again before the Court with the question of his competency.

Now, our position is, Judge, that even though there has been a determination—it is not like a law of the case where legal findings have been made, Mr. Lonchar's mental stability has not been static. It hasn't stayed the same way.

**THE COURT:** It is my understanding in your pleadings that you have alleged his mental capacities and/or ability and competency has declined over the time that he was last evaluated.

**MR. MEARS:** That is correct.

[12] **THE COURT:** And that is your claim in this petition, through this Mr. Lonchar?

**MR. MEARS:** That is correct, Your Honor.

**THE COURT:** First let me hear from Mr. Matteson. Do you have anything, Mr. Matteson?

**MR. MATTESON:** No, Your Honor.

**THE COURT:** Ms. Westmoreland.

**MS. WESTMORELAND:** Your Honor, let me say one thing for the record. I think since Mr. Larry Lonchar is here, it probably would be appropriate to at least get a statement from him on the record indicating that he in fact still wants to proceed with his execution.

I don't want us to miss that step, or Mr. Matteson can state it on behalf of his client, one way or the other, before this proceeding is over.

But to move on into the question that is before the Court and clarify one thing just to be sure Your Honor understands, Mr. Mears is correct, there has not been a hearing on the merits of a State Habeas Corpus for a Federal Petition.

**THE COURT:** I read that in here. Every time it gets to the point of hearing, he dismisses the proceeding.

**MS. WESTMORELAND:** And there has only been one [13] dismissed by Mr. Lonchar. There is some talk about his changing his mind and the highs and lows, if you will. Actually, Mr. Lonchar did not even want this direct appeal filed. And that was an automatic appeal, so he had no choice in that matter.



I believe there is some indication he did agree to a Cert Petition being filed, but after that point, he objected to anything being filed on his behalf. It wasn't until the day of this scheduled execution in February of 1993 that Mr. Lonchar indicated that he wanted to change his mind and have a Petition filed.

He has subsequently stated in open court that he made a mistake. He did not state anything specific about the reasons, but he said he made a mistake at that point, he had clarified the matter, and he wanted to have his Petition dismissed.

He started writing to my office and to the Court, I believe, as early as July of 1993 saying he wanted the Petition dismissed and did not want to proceed further.

Since that time, he has been consistent in everything that I have seen in wanting to go ahead and proceed with the execution in this matter.

The problem before the Court obviously is the issue of standing. We have an individual who should [14] be presumed competent based upon all of the Court findings. This is somebody that has been found confident by four separate courts. Up until recently, every evaluation had said he was competent.

What we have now is an affidavit from Dr. Herendeen, and I would highly question the use of Dr. Herendeen's affidavit in the first place. Dr. Herendeen says he is what I would consider to be a treating psychologist. I see no waiver of the patient-psychologist privilege in here. I don't know if Larry Lonchar has waived that privilege to allow Dr. Herendeen to give an affidavit suggesting he would find Mr. Lonchar incompetent, if he did an evaluation, and would at least raise that as an issue of concern if the Court is considering that affidavit absence some waiver for privilege by Larry Lonchar.

But, in any event, I would submit that even if taking at face value, Dr. Herendeen's affidavit is insufficient to carry a burden of proof or to require this Court at this late stage to essentially reopen the litigation and put us back where we were in actually 1990 when we did this

and went through four different courts litigating the issue of competency.

This is not something new. This Next-Friend [15] Petition is not new. I reviewed the issues raised in the Next-Friend Petition. Each issue presented in this Next-Friend Petition was either presented in the Next-Friend Petition raised by Ms. Kellogg in State Court or in Federal Court.

There was one issue, I believe, that wasn't raised until the 1993 Petition in which Mr. Larry Lonchar joined. So these issues have been out there for at least two years, if not longer.

Mr. Mears wrote to Judge Castellani in July of 1994 stating he was going to represent Mr. Milan Lonchar in any proceedings that were filed. Nothing was filed. Nobody ever even requested access to the prison to Mr. Lonchar to have an evaluation until June 14, 1995 after an execution date had been set in this matter.

Just to clarify for the Court, for the record, the prison has a policy that they require a court order to allow a psychiatrist or a psychologist to come in and conduct an evaluation of a death row inmate.

I know of only one case where we have had an evaluation done without a court order and that was in the case of Nicholas Ingram. Every other case, that I know of, a court order has been entered.

[16] I believe Your Honor has seen similar requests in a Habeas case before this Court, asking to have access to have an evaluation conducted. The prison has interest in its security, the security of death row inmates and individuals who have access to them.

Normally, we are not in a position of sitting here at the last minute on an individual who has been evaluated numerous times in the past.

Our opposition is based on the fact that the motion was not made until yesterday. We've got an execution scheduled for Friday. It is a motion that could have been filed along with a Next-Friend Petition months ago.

All of the information used to support this motion could have been obtained and was available to them months ago.

Dr. Davis signed his affidavit in February of 1995. Dr. Herendeen last visited Mr. Lonchar, according to prison records, in December of 1994. Where has all of this been in that length of time?

In DeKalb County we were accused of being obstructionists, the State being obstructionists. Well, the State is not being obstructionists. The State is simply following established prison policy. Mr. Mears knows about it. He has had to deal with it [17] in the case when he filed it on behalf of Ms. Kellogg.

Our complaint is that he could have done this a long time ago instead of waiting until the 11th hour to sit here and try to actually delay the execution that is set for Friday.

It is going to be difficult at best to get evaluations done in this length of time. Certainly, if an evaluation is done on behalf of Mr. Milan Lonchar, we are going to want our own evaluation done, and we will have to get a court order to do that as well.

We would submit that based upon the circumstances of this case, first of all, Mr. Milan Lonchar has not shown that he should be excused from the requirement of paying the filing fees in any event. Certainly that can be remedied at this stage, that he has not shown that he has standing to proceed so the Court even gets to the question of access for the psychological evaluation.

What he's got is two individuals who say, "Well we need to do a further evaluation to say whether he is competent or not." That is not good enough at this point in time.

\* \* \* \*

[25] That is a good example, Your Honor, of the vacillation that is an indication of this mental illness that Larry Lonchar suffers from, this going back and forth.

What is going to happen on Friday afternoon at 2:30 if Larry Lonchar then decides, "Well, I don't want to be executed, I want to reinstate my appeals"?

PETITIONER LARRY LONCHAR: Come on, Mr. Mears, let's stop this. I stopped my execution on February 19, 1993 not on my own. I was under pressure from you lawyers. I was told by a lawyer that my brother was going to commit suicide if I carried on with the execution. I did not want to stop my execution, but I was pressured to stop my execution. So let's keep on—about me flip-flopping and changing isn't correct. I did not want to stop my execution. I stopped it because I was pressured to stop my execution.

THE COURT: Go ahead, Mr. Mears.

MR. MEARS: Your Honor, that is what we are asking. I understand, to some extent, the frustration that Mr. Lonchar is experiencing in this matter. But, again, in all due respect to him, that again is indicative of the type of illnesses of which [26] he suffers.

All we are asking for this Court to do is to order that he be evaluated in a clinical setting in some way that it is not someone that walks in and looks at him as was done in one of the previous hearings that said, "I observed him across the room and he looked competent to me." That was the statement from Dr. Storms, one of the State psychologists.

We are asking that he be evaluated. If at that point, Your Honor, a report is returned to this Court that says that he is competent, then the Court will have to do what courts do and that is follow the law, and then the State can go back to DeKalb County and have an execution warrant signed and entered.

The Heavens will not fall on Friday afternoon at 3:00 o'clock if Mr. Lonchar is not executed. The conduct of Mr. Lonchar from February of 1993 to this moment surely should raise some question in the Court's mind about his competency to understand what he is doing. And that is the real issue here.



There is a myriad of cases out there, *Whitmore*, all of the cases that Your Honor has seen before, I'm sure, talk about the standard for competency for someone to be executed.

[27] Why can't we move with just some deliberation and make sure that this conduct that has been exhibited for the past two years or even the conduct since his last evaluation by Dr. Davis, who now says he should be reevaluated, that that conduct is not indicative of a deteriorating mental condition which has gotten worse over the years, which we submit that it has. That is what we are asking, Your Honor. Quite frankly, we can't prove that he is incompetent.

THE COURT: I understand.

Ms. Westmoreland, do y'all have anything else?

MS. WESTMORELAND: Your Honor, I just need to point out one thing. When Mr. Mears talked about they moved as quickly as ethically possible because Mr. Lonchar had been represented by counsel up until the Cert Petition was returned, it wasn't filed, it was returned by the U.S. Supreme Court because Mr. Lonchar refused to sign a Pauper's Affidavit to allow it to be filed.

In fact, Mr. Lonchar specifically dismissed his counsel at the hearing before Judge Connelly on June 23, 1994. The Court allowed Mr. Lonchar to dismiss his counsel and allowed him to dismiss the petition. After that time, Mr. Bayliss and Mr. Stafford Smith continued to file pleadings without Mr. Lonchar's [28] authorization. That doesn't mean he was represented by counsel and that there were pleadings continuing at his request or at his wish. Certainly, a Next-Friend Petition could have been filed anytime after that point, if there had been concerns and if it had been appropriate.

Other than that, Your Honor, I think that the record before the Court is sufficient. Mr. Lonchar has indicated his wishes quite clearly. He has told the Court why he changed his mind the last time in February of 1993. It is not because he is flip-flopping. It is because of what

he was told. I don't think it is incompetent to decide you don't want to go forward with something that might result, at least what you've been told, in having your brother commit suicide. If anything, that reflects that Mr. Lonchar is quite competent and has some compassion for his brother.

The fact that he now wants to go forward with his execution is simply consistent with his desires, except when he says he was pressured to change his mind otherwise.

MR MEARS: Your Honor, I know you don't want me to keep jumping up and responding, however, we can put up evidence, if the Court wants to hear it, that [29] that was not the reason that Mr. Lonchar told his family he was withdrawing his appeals. Mr. Milan Lonchar was in conversation with Larry and it was entirely different reasons.

There is also evidence that we could put before this Court that he has now said that he wants to have his organs donated and he doesn't want to be executed, he wants to have some other form of execution.

All of that, Your Honor, is indicative of behavior that should be looked into and there should be an evaluation. There is no reason to rush to execution.

THE COURT: The Court is going to leave the bench for a few minutes and review some of this. I don't want to make a ruling on this until I—I don't feel comfortable at least not looking through these papers and these petitions and all of this information that I've been given. I want to take a few minutes to look at it.

MR. MATTESON: Your Honor, Mr. Lonchar wants to address the Court.

PETITIONER LARRY LONCHAR: I would just like to clarify regarding what Mr. Mears just said. I can present evidence that at 6:15, 45 minutes before my [30] execution, that Mr. Stafford Smith, a lawyer, did call me back there in the death house when I was waiting to die to inform me that if I went through with this, my brother, Paul Lonchar, would commit suicide. He said

he could present evidence that there was another reason why.

THE COURT: Mr. Lonchar, I'm going to take all of that into consideration. The Court's main concern in this matter is what to do with the allegations and the claims that have been filed on your behalf.

The Court has a clear understanding that you wish to proceed with your execution. The Court has been made clear in that from what you've said in Court and from me looking at you in the eye and you telling me that that is what you want to do.

Is that what you want to do? Do you want to proceed with your execution?

PETITIONER LARRY LONCHAR: That is correct, Your Honor.

THE COURT: Well, the Court will take that into consideration also. But I also want to look at these papers since I'm charged with the responsibility of doing it. I will take them seriously. I will look at them and return to the bench as shortly as I can after looking at them.

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IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

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Case No. 91-V-331  
91-V-332  
91-V-335

LARRY GRANT LONCHAR,  
*Petitioner,*  
vs.

A.G. THOMAS, Warden,  
Georgia Diagnostic and Classification Center,  
*Respondent.*

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TRANSCRIPT OF PROCEEDINGS  
HEARD BEFORE HONORABLE E. BYRON SMITH,  
JUDGE, FLINT JUDICIAL CIRCUIT,  
IN BUTTS SUPERIOR COURT, ON JUNE 23, 1995.

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[2] THE COURT: The Court will call the hearing to order.

The first order of business, I guess, is for the Court to indicate to counsel what I have been served with. I have a copy of the United States District Court's opinion, which was rendered the 22nd of June, signed by Judge Camp. I have got an affirmation from the Supreme Court dated the 22nd of June on Mr. Lonchar's case that I heard Wednesday in Monroe County affirming the Court's decision in that. Then this morning, in Barnesville, in Lamar County this morning, I was served with what appears to be a 1983 suit. And also, after I got to Butts County, a motion for stay of execution and a petition for habeas corpus that is filed by Mr. Matteson.



Mr. Matteson, are you the only counsel at interest in this hearing?

MR. MATTESON: Mr. Smith is here, too, is associated on the case.

THE COURT: When did he become associated?

MR. MATTESON: A few minutes ago because we think we are going to go into the history of the previous filings.

[3] THE COURT: Has he filed a notice of appearance?

MR. MATTESON: No, your Honor.

MS. SMITH: Your Honor, no. I will orally do that, if I may. I will write that on the petition.

THE COURT: The Court considers that a little bit late notice of appearance, after the Court has already called this case for the purpose of a hearing.

Mr. Matteson, the Court will hear from you on whatever it is you filed here, sir. I want to know the order of events, what your claims are, what sort of relief you are asking from the Court, and whether or not your client assents to all this or not.

MR. MATTESON: Well, I think that is a good way to start the proceedings.

THE COURT: Well, why don't you ask him, sir. Put him under oath or whatever it is you want to do. Now, speak up, Mr. Lonchar.

[LARRY LONCHAR, HAVING BEEN DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:]

DIRECT EXAMINATION BY MR. MATTESON:

[4] Q Larry, we filed this morning two actions in your behalf, a civil rights suit and something akin to a writ of habeas corpus, seeking relief from your sentence and attempting to stay your execution.

THE COURT: Mr. Matteson, I am going to have to ask you, also, to speak up, sir this is close quarters. Just talk like you are talking to a jury.

MR. MATTESON: I'm sorry, your Honor.

Q Larry, we filed two actions this morning. Are you familiar with those actions?

A Yes, I am.

Q What are they to do?

A I really don't know.

Q Did you read those petitions?

A No.

Q Do you want those petitions filed on your behalf? Do you want to take time to review these documents to see if you remember them? I know you are under a lot of pressure.

MR. MATTESON: Your Honor, could we take a few minutes to let him review these documents?

THE COURT: I want him to tell the Court that that is what he wants to do.

A They summarized what is in the documents. I [5] really don't care to read all of it. They summarized more or less what is in them. So I will accept that.

Q You want your execution stayed if that is possible?

A I would like you to add, let's see, how can I say that? Yes, go ahead and—yes, you have explained it me. Yes.

Q So these filings are authorized?

A Yes.

Q And you do want your execution stayed?

A Correct.

MR. MATTESON: Does the Court want to ask any questions?

THE COURT: Mr. Lonchar, the Court heard portions of this on Wednesday, and I don't know anything about the trial of your case because I was not the sitting judge. I also was not a part of the first habeas corpus that you dismissed in front of Judge Cook Connelly, if that is her proper name.

MR. MATTESON: Your Honor, could I interject something?

THE COURT: Yes, sir.

MR. MATTESON: That was dismissed without prejudice.

[6] THE COURT: I understand that.

MR. MATTESON: Reserved the right to refile.

THE COURT: I understand. On Wednesday, in open court, upon me asking you a question, you answered me in the affirmative that you did not wish to proceed with any more petitions, examinations or anything else. You also reiterated that in the newspaper and the media yesterday. I read the Atlanta Constitution this morning, and that appeared in the Constitution.

What is it that you want to do, Mr. Lonchar? You tell the Court what it is you want to do. Do you want to file a habeas corpus petition asserting these rights, or do you want to proceed with what you told me you wanted to proceed with?

MR. LONCHAR: Well, the agreement I have made with these attorneys is I've signed a habeas corpus, or whatever, just temporarily, a stay for eight or nine months until this issue of—until the Georgia Legislature is in session where—my life is nothing. You know, I am not afraid of dying at three o'clock, you know. I was looking forward to it. But if I can die with a little, you know, a little, my life being a little worthwhile, I have chosen that [7] option. The only way, I have been informed by these attorneys, is to stay it for eight or nine months where maybe the law can be changed from electrocution to lethal injection so when I die a couple of my organs can be donated to someone so someone else can live, so I can die knowing that my life wasn't completely wasteless, you know, someone else can live. You know, in eight or nine months if the Georgia Legislature doesn't pass it or does, in eight or nine months I will withdraw this because I plan on dying. I would just like that option of trying to save a few people's lives.

So it is not like I am not going to be executed. Eight or nine months is all I—these attorneys have assured me

that that is all I have to live for, just to try to get this law changed.

MR. MATTESON: Your Honor, may I interject something?

THE COURT: Yes, sir.

MR. MATTESON: He didn't have this option at the last hearing. I had not been able to put this scheme together or series of pleadings. So it wasn't something—

THE COURT: I think I recall him saying he did [8] not want to file one at that time.

MR. MATTESON: That is true, Your Honor, but he didn't have the option of this type of a pleading. I think if that option would have been available then, he would have signed it at that time. That is my fault. That is not his.

THE COURT: I believe under the status of the law, Mr. Matteson, you are the only attorney, he is the party at interest in this case, besides the Attorney General's office, or the State. Do you agree with that?

MR. MATTESON: Yes, your Honor. This is a classic writ of habeas corpus. Everybody gets them, your Honor.

THE COURT: I understand.

Does the State have anything to say?

MS. WESTMORELAND: Well, your Honor, in light of what Mr. Lonchar has just said, I don't think it is a classic writ of habeas corpus. That is the concern I have got right now, what—the pleadings that I received were a classic writ of habeas corpus challenging, saying that Mr. Lonchar's conviction and sentence were unconstitutional and seeking to have that conviction and sentence vacated, which is [9] a classic writ of habeas corpus.

Seeking to have the Legislature change the method of execution, which nobody can guarantee the Legislature is going to do anything and certainly not that it will be done in eight or nine months, is not a classic peti-



tion for writ of habeas corpus. So I think, at least for the purposes of the record, what Mr. Lonchar says is he simply wants to change the method of execution. What Mr. Matteson says is we have got a petition for writ of habeas corpus challenging the conviction and sentence.

I am not hearing the same thing coming out the two individuals. And until we do, I would oppose the granting of the stay at this point in time. I would certainly like some further clarification on whether we are actually seeking to have a conviction and sentence challenged in this case.

MR. MATTESON: Well, sometimes people speak in terms of hope and maybe attorneys speak in terms of what is fair.

THE COURT: Well, let the Court go over this.

Mr. Lonchar, your petition and claims for relief in Claim Number One is as follows: Now, look at me, sir and listen to me.

[10] Not only is execution by electrocution cruel and unusual punishment, but Larry Lonchar ought to be allowed to be killed by the State in such a manner that he may contribute his organs to patients in need for the betterment of society.

That is your first claim. That is what you have told the Court today, that you object to the method of execution in the State of Georgia because it is by electrocution. And according to what I have read also in here, you say it is because it will destroy what organs you have in your body.

The Court will inform you, sir, that in Georgia the only method of execution is by electrocution. There is no other method authorized under our statute. I think, according to your own pleadings here, that electrocution was established in 1924. Before that it was hanging.

In the second claim that you have made before the Court today—

MR. MATTESON: Your Honor, can I say something? We are challenging under the Georgia Constitu-

tion. I don't think anybody has ever done that before, and it is much more liberal than the Federal Constitution, so these are issues that have never [11] been presented as far as I know.

THE COURT: Well, the Court will take judicial notice of the fact that the Supreme Court of the United States has said that electrocution is not cruel and inhumane execution.

MR. MATTESON: Your Honor, we think we ought to be entitled to ask the Georgia Supreme Court whether they agree with that.

THE COURT: Your second claim, Mr. Lonchar, says as follows: Petitioner's conviction and sentence must be reversed because the trial judge failed to conduct a competency hearing when the proceeding raised a bona fide issue respecting petitioner's competency in violation of petitioner's Sixth, Eighth, and Fourteenth Amendment rights.

Do you claim that as the grounds? You may confer with your attorney.

MR. LONCHAR: Yes, sir.

THE COURT: Your third claim says petitioner was tried and sentenced to death while incompetent in violation of his Sixth, Eighth, and Fourteenth Amendment rights.

Do you claim that you were incompetent at the time you were convicted?

[12] MR. LONCHAR: I don't believe it. Yes, sir.

THE COURT: Your fourth claim is: Petitioner was deprived of his right to effective assistance of counsel on appeal in violation of the Sixth Amendment and cites *Evitts v. Lucey*.

MR. LONCHAR: Yes, sir.

THE COURT: Claim Number Five states that defense counsel unreasonably and prejudicially failed properly to investigate and present his client's background and mental state, with the result that the evidence of insanity,

incompetency invalid waivers of constitutional rights, and compelling evidence in mitigation of punishment was not presented, in violation of Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

Do you adopt that?

MR. LONCHAR: Yes, sir.

THE COURT: The Sixth Claim is a legal claim that you are not able to waive your presence at a capital felony trial which, I think according to what I read, you waived your presence by not showing up at your trial.

Do you adopt that.

MR. LONCHAR: Yes, sir.

[13] THE COURT: Claim Number Eight that the State introduced convictions predicated upon guilty pleas which, I assume were in your past, which were unconstitutionally obtained and which on their face revealed that they were not knowingly, intelligently and voluntarily waived, and were taken without the assistance of counsel. In addition to the plea, transcripts introduced contained references to other unconvicted criminal acts in violation of certain constitutional rights.

Do you adopt that?

MR. LONCHAR: Yes, sir.

THE COURT: Number Eight, Predication of a conviction for murder and a death sentence on a theory which the prosecutor knows to be false cannot withstand—I haven't read that so I don't know what that means.

The prosecutor doesn't file anything except a notice of the death penalty, so I don't know what means.

Number Nine, by refusing accurately to instruct the jury on the jury's instructions—of course, you weren't there so you don't know what Judge charged the jury.

[14] Do you adopt that?

MR. LONCHAR: Yes, sir.

THE COURT: Number Ten is more of the same on jury instruction.

Do you adopt that one?

MR. LONCHAR: Yes, sir.

THE COURT: You claim that one of the aggravating circumstances that the jury found in your sentencing phase of your trial was improperly—that they were improperly allowed to hear that.

Do you adopt that?

MR. LONCHAR: Yes, sir.

THE COURT: And then there is another claim under Number Twelve about the cruel and inhumane, horrible, wantonly vile application of Georgia's execution statute.

I assume you have already said you adopt that?

MR. LONCHAR: Yes, sir.

THE COURT: Well, your Thirteenth Claim is a *Witherspoon* claim, which is a rather generic claim.

Fourteen is another *Witherspoon* claim.

Fifteen is interjecting your character in evidence through hearsay.

Sixteen is a procedural claim on the jury [15] deliberation.

Seventeen is another aggravating circumstance claim

Eighteen is an objection to the prosecutor's argument.

Nineteen, the same thing.

Number Twenty is an *Allen* charge claim.

Number Twenty-one is another claim for jury charge incorrectness.

Twenty-two is a *Batson* claim.

Now, are these your claims in this case, Mr. Lonchar?

MR. LONCHAR: Yes, sir.

THE COURT: Have you signed this verification of this petition for habeas corpus verifying that the facts are true and correct?

MR. LONCHAR: Yes, sir.

THE COURT: Well, is it signed? I don't have a signed copy of it.

Is his copy signed that was filed?

THE CLERK: Not the habeas petition.

THE COURT: The Clerk indicates that his habeas corpus petition is neither verified nor—



MR. MATTESON: It was verified when it was [16] filed, your Honor.

THE CLERK: Not the habeas corpus one is not.

THE COURT: The Court will not consider it, any of these claims, will not consider a stay or anything else until the Court has a verified petition in the Court's hands.

MR. MATTESON: Your Honor, this is a verified one that we filed. We considered it a blended petition so we didn't file it on the habeas standard form. This is a blended 1983 with a habeas, so we didn't put it on a habeas petition. If we are going to get a man executed over what sheet of paper we put it on, then we have got a problem.

THE COURT: Let him sign one.

MR. MATTESON: Which one?

THE COURT: Is there a verification in here that is unsigned?

THE CLERK: Yes, sir.

THE COURT: Mr. Matteson, these are your papers. These are not the Court's papers. The Court is pointing out to you, sir, that I don't have a verification. I don't even have a petition in the Court's hands that is signed by you.

MR. MATTESON: Well, it was filed this morning, [17] your Honor. That is why we are looking for one. I think that may be it right there.

THE COURT: If you want your client to execute a verification, the Court will allow him to do so.

MR. MATTESON: Your Honor, may I have that—that's—

THE COURT: These are not the Court's papers. These are yours, sir.

MR. MATTESON: Thank you.

Your Honor, we would file that now, if the Court would permit, in open court.

THE COURT: The Court having heard from the Petitioner, the Court will hear from the State.

MS. WESTMORELAND: Your Honor, at this point, I realize what Mr. Lonchar has said. I have also been watching Mr. Lonchar through these proceedings, watching him shake his head, watching him respond after he is virtually told by his attorneys what to say. I am concerned about Mr. Lonchar actually verifying, although I know he has signed these pleadings, I am concerned that he actually is swearing that the contents of them are true and that he actually thinks they are legal infirmities with his conviction and sentence.

[18] I would also note to the Court that Mr. Lonchar had the opportunity to do just this two days ago. Habeas corpus is still in the nature of an equitable remedy. And a request for a stay is a request for an equitable remedy in this court. I think somebody is trying to manipulate this Court, or it appears to be. I'm not saying anyone in particular, but it certainly has that appearance. I don't think there is anyone that can guarantee Mr. Lonchar anything is going to happen within a certain period of time.

I notice there is a motion for an expedited hearing in this case. Well, under the statute that is in effect now, this case automatically gets sent to the Superior Court Judge's Council for assignment to a different judge, and there are no provisions that require any type of expedited hearing. We certainly want it expedited if there is one. But I just want to be sure that there are no guarantees out there that this is going to proceed within any specific time frame or what may happen in this matter. We certainly think that this matter needs to be clarified as to whether we are actually manipulating the Court and if Mr. Lonchar is simply doing this with the idea that in eight months he is [19] going to come back in and dismiss it again. I think that is manipulative on someone's part, and we would object to a stay being issued on that basis, your Honor.

THE COURT: Mr. Matteson, let me ask you a question. How many times has the defendant in a case such

as this, how many times does he get to file and dismiss, file and dismiss, file and dismiss? How many times—what is enough, and what is not enough?

MR. MATTESON: Whatever his constitutional rights permit. If it is one time, that's what it is. If his constitutional rights permit two times. I mean, this was dismissed without prejudice. As far as I am concerned, this is like an initial filing. I mean, if there was problem with that, they should have dismissed the last one with prejudice. I mean, I'm not into filing and dismissing.

THE COURT: Well, let me ask you this, sir. Suppose tomorrow afternoon that Mr. Lonchar decides that this petition should be dismissed. Then are you saying that if the Court reschedules his execution and he files another one that the Court has got to go through all this again?

MR. MATTESON: No, because if this was [20] dismissed, it should be with prejudice because this is going to be litigated.

THE COURT: Well, I had nothing to do with the first habeas corpus and had nothing to do with the legal technicalities of whether it was dismissed with prejudice or without prejudice. I assume it was dismissed without prejudice or I would have already been told that.

MS. WESTMORELAND: It was, your Honor. I believe Mr. Stafford Smith was counsel at that time and specifically requested that it be dismissed without prejudice. And the Court did so.

THE COURT: Well, does the State have anything to offer the Court that Mr. Lonchar does not have the right to file this petition?

MS. WESTMORELAND: No, your Honor.

Your Honor, and I went back through the transcript from the hearing that we had earlier this week. And the reason I am saying that is because at that time Mr. Lonchar was not advised that he could not file one if he didn't file one that day.

I think he needs to be advised at this point that if he dismisses this one, then that is it. The second dismissal

is certainly with prejudice. If we [21] could find a knowing and voluntary waiver in some other proceeding, and I have gone back through and looked to try to find a basis for that, your Honor. I think there is certainly waiver by argument, but I can't find any specific waiver on the record in any particular proceeding.

THE COURT: Well, of course, a civil case can be dismissed up until the time the jury returns a verdict. The Court has got several questions that I want to consider. And I will do this outside everybody's presence. I am going back there and think about it myself, but the defendant waiting until the very last moment, some one hour and thirty minutes before he is supposed to be executed, and calling the Court together at such a late time, if that has any effect on the Court's decision. And I will just take a short recess and come back.

MR. MATTESON: Your Honor, could I interject one thing? I have been trying to file this thing and proceed on this since 10:30 this morning. I was down here trying to do this this morning.

THE COURT: I got my first facts this morning. I don't remember the exact time the first facts came. I think it was 26 pages, and then I received [22] something else, and then a response from the Attorney General.

THE COURT: Mr. Lonchar, the Court is going to take a recess. Look at me, sir. I am going to take a recess, and I will come back and then I am going to ask you one more time if this is what you want to do. I probably will make some definitive remarks concerning all this when I come back. But I am going to take a recess, and then I will come back and ask you once again what it is you want to do.

The Court will be in recess for about 15 minutes.

[RECESS TAKEN].

THE COURT: The Court spoke to counsel in chambers concerning the various legal issues involved in this case.



Mr. Lonchar, the Court told you that when I left that I would come back and ask you if this, in fact, is what you wish to do and have you reiterate on the record for everybody's benefit that this petition that you have filed by Mr. Matteson is, in fact, your petition and that you want to file it.

MR. LONCHAR: Yes, but I would just like to reiterate, too, that in seven or eight months I will [23] be back. I will be asking the Court to withdraw this petition with prejudice. So, that's it. I know the reason why I am here asking this temporarily stayed. That is all it is to me. So like I say, in seven or eight months when the Legislature is over, I will be back asking the Court to withdraw it with prejudice. I have already informed the attorneys. That is all I can do.

THE COURT: You understand what is going on today, don't you, Mr. Lonchar?

MR. LONCHAR: Yes.

THE COURT: You are here with very competent counsel. You understand the nature of this proceeding, don't you?

THE DEFENDANT: Yes.

THE COURT: Since this case, the period of execution has been set for this afternoon at 3:00 through next Friday at noon, the Court will grant a temporary stay, take the matter under advisement and consider whether—the only question the Court has in its mind concerning the filing of this petition is the timeliness issue. I am going to rule as far as what is timeliness and if that particular issue is delineated at a higher level then maybe it should [24] be, but I am going to make a ruling as to what is timely and what is not timely and write out a written order if I, in fact, don't grant the petition being filed. Of course, if I do, then it will go through the normal chain and process.

The Court will take it under advisement and temporarily stay the execution.

You may remove the prisoner.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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Docket No. 1:95-CV-1656-JTC

Atlanta, Georgia  
June 28, 1995

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LARRY GRANT LONCHAR,  
*Petitioner,*

v.

ALBERT G. THOMAS, Warden,  
Georgia Diagnostic and Classification Center,  
*Respondent.*

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TRANSCRIPT OF MOTIONS  
BEFORE THE HONORABLE JACK T. CAMP  
UNITED STATES DISTRICT JUDGE

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[2] PROCEEDINGS:

(Before The Honorable Jack T. Camp on June 28, 1995).

THE CLERK: Your Honor, this is the time set for an evidentiary hearing in the case of Larry Grant Lonchar versus Albert G. Thomas, Case Number 1:95-CV-1656-JTC. At this time will counsel please stand and identify yourselves and your clients for the record.

MR. STAFFORD SMITH: Clive Stafford Smith on behalf of Mr. Lonchar.

MR. MATTESON: John Matteson on behalf of Mr. Lonchar.

MR. STAFFORD SMITH: And Mr. Lonchar himself.

MS. WESTMORELAND: Mary Beth Westmoreland on behalf of the Respondent Albert G. Thomas, Warden, who is also with me at counsel table. Paula Smith is also at counsel table.

THE COURT: Okay, Ms. Westmoreland.

All right. Counsel, I understand that a petition for federal relief in the form of a writ of habeas corpus was filed first thing this morning on behalf of Mr. Lonchar; is that correct.

MR. STAFFORD SMITH: Yes, Judge.

THE COURT: And that the State has now filed a motion to dismiss?

MS. WESTMORELAND: That's correct, Your Honor.

THE COURT: All right. Ms. Westmoreland, I'm going [3] to ask if you would tell me, normally a prisoner is entitled to a federal court reviewing a State sentence, and I don't believe Mr. Lonchar's sentence has ever been reviewed by the federal court on the merits. I would like for you to briefly state for me what you see is the posture of the case and the basis of your motion to dismiss.

MS. WESTMORELAND: Yes, Your Honor.

And I will acknowledge this is not the normal status that we find ourselves in either in death penalty or non-death penalty cases. And I tried to find a case that was similar, on point, and have only found analogous language without finding a case that puts us in the same posture that we find ourselves in before this Court. And normally for an inmate who had not had a hearing on the merits and had adjudication on the merits of a federal habeas corpus petition, we would not be moving to dismiss. But it's based on the particular procedural posture of this case that we're asking the Court to at least con-

sider the question of the conduct of the petitioner in getting to the Court at the stage that we have arrived.

And it's based upon the fact that we have in the past, there has been a direct appeal where issues were litigated, but since that time Mr. Lonchar refused to participate in a habeas corpus filed in State courts, refused to participate when this Court handled I believe three days of evidentiary hearings regarding Mr. Lonchar's competency, [4] advised Mr. Lonchar, discussed the consequences of not following through with the habeas. His competence was addressed by four separate courts at that time.

We again set a new execution date. Mr. Lonchar at that time we ended up with a petition being filed by Mr. Lonchar in the State Court, which he voluntarily dismissed without prejudice, and we're not asserting that that acts as a waiver. That it is a dismissal under State law, it fits in to show the pattern of conduct that we have before the Court.

Within the last two weeks we have now had next friend actions filed in State court litigating through the State Superior Court, actions in the Georgia Supreme Court filed next friend, actions filed through this Court next friend and litigated through this Court, and the Eleventh Circuit Court of Appeals next friend. And it is now at the eleventh hour that Mr. Lonchar is coming into this Court seeking to have this Court stop the execution, and to go ahead and proceed with an adjudication on the merits of his claims.

And our position is simply this. Habeas Corpus is an equitable remedy. The conduct of Mr. Lonchar in getting to this stage of the proceeding in eight years after he was sentenced, his sentence was imposed I believe June 27th, 1987, he is now coming to the federal court for the first time on his own saying I want to have a hearing on the merits of my petition, I want to litigate the merits of my petition.

[5] We've been here twice before when he could have done this. Granted, they were next friends actions. Mr.



Lonchar was in court the first time and certainly could have taken an opportunity to do so then, could have taken the opportunity last week to tell this Court that he wanted to stop the execution and go forward with the federal habeas petition. But it is because of the nature of the delay in this case, the nature of the abuse, if you will, through the use of judicial resources in going through all of these next friend actions which Mr. Lonchar has consistently refused to participate in that we've reached this Court at the eleventh hour. And that is our position on why we think it's an abusive action.

THE COURT: Now, of course, and I'm sure you are well versed in this area of the law. You agree with me, then, of course the fundamental rule is Mr. Lonchar would have the right to a federal court review of his sentence in the normal situation?

MS. WESTMORELAND: In the normal situation certainly, Your Honor.

THE COURT: And you are aware of no case where a federal court has not or refused to review the first petition filed by a State prisoner for review of that petition?

MS. WESTMORELAND: I don't, I could not find a case where we've had a situation like this where it's been the first petition actually signed by the petitioner that the Court has [6] declined to consider. But I couldn't find a case where we have the situation like this at all one way or the other, Your Honor. To my ways the best I can determine we are in somewhat of a unique situation. There are cases on next friend status, there are cases on volunteers, there are cases on abuse of the writ, there are cases dealing with having a first petition dismissed on procedural default grounds and not actually reviewing the merits of the claims presented, but it was a petition filed by the inmate himself.

I can't find a case that is directly on point with what we have before this Court. But I, what our position is, is again I said, Your Honor, at some point in time there ought to be a way to focus on the conduct of the peti-

tioner in getting to the Court and on what has taken place over the past eight years in getting to a position we could have been in years ago.

THE COURT: Okay. Let me ask you this, Ms. Westmoreland, and part of this—since this was only filed this morning I have only been able to review quickly the record in the case. Tell me what the record before this Court to make this determination is, and what is the pending time set for Mr. Lonchar's execution?

MS. WESTMORELAND: Your Honor, to answer the last question first. Right now the time is set for 3:00 p.m. this afternoon. The execution window actually expires at noon this [7] Friday. Once we get past that time a new date would have to be set at least ten days from the date an order was signed by the court.

So for the court's information on that point, what we have in the record and we would ask the court to take judicial notice of, its only prior two cases in the prior proceedings the court has before it—

THE COURT: Okay. Let me interrupt you there for just a moment. Mr. Stafford Smith, do you agree that's appropriate we have two cases that this court has adjudicated, one with an extensive evidentiary hearing where Mr. Lonchar was present and I discussed the hearing with Mr. Lonchar, do you think it's okay for the court to reach and in reaching a determination to take notice of those proceedings?

MR. STAFFORD SMITH: I believe there are some important assets to that, but I have no problem with the court taking judicial notice.

MS. WESTMORELAND: In light of that, I think this court certainly recalls the proceedings that we had, they were quite extensive, and I believe at that time not a situation that we have been faced with in this, in this State to that extent. We had had one other case volunteer, but this court had an extensive colloquy with Mr. Lonchar in court at the conclusion of those hearings and went through with him in detail the purpose of the proceedings,

asked him if he, in [8] fact, wanted to waive his appeals, advised him of the possible consequences of that waiver at one point in that hearing. I've attached that part of the colloquy of the transcript to my response for this court. At one point the court did again, we got to that point, can he stop this and file a federal petition. At that point in time we agreed with the court he could have stopped right then, filed a federal petition before we proceeded further and continued with the conduct that I'm referring to. We certainly could have proceeded further.

However, that was long before we have undertaken the subsequent actions, and that includes the filing less than a week ago with this court. I believe last Thursday night this court had a second petition from Mr. Lonchar's brother which Mr. Lonchar again could have joined in, could have raised virtually the same issues that are before this court today. The only issue I recall that's not in there is the first issue dealing with the method of execution, I believe there may be one other claim that's not in that petition but has been in prior petitions.

The issues presented in here, they have been presented in next friend petitions, they, Mr. Lonchar has effectively done what I'm sure many death row inmates would like to do, that's succeed in having his proceedings delayed by doing nothing. By simply refusing to take that action on his behalf.

[9] Now, what we have in the record as I said is a transcript of the proceeding before the Court the last time. The pages are in, the Court advised Mr. Lonchar of the consequences of those proceedings and some subsequent proceedings when Mr. Lonchar has refused to participate in this matter. The Court did not have a hearing obviously last week with Mr. Lonchar present, but I don't think there is any question that Mr. Lonchar was trying to join in the Petition at that time. I would assume that counsel would not argue with the fact that he at that point in time had not indicated a desire to proceed forward with matter.

THE COURT: Well, let me ask you two additional things, then. One, are the record of the proceedings, the most recent proceedings before the State courts where he did seek to file a Petition of Habeas Corpus in the State courts of Butts County, a hearing held by Judge Smith?

MS. WESTMORELAND: That's correct, Your Honor.

THE COURT: Are the transcripts of that hearing and Judge Smith's order appropriately a part of the record?

MS. WESTMORELAND: Your Honor, I believe we have made them available to the Court, we have, I did not actually file them this morning, just by time constraints did not get them filed. I think it would be appropriately considered by the Court as a part of the record, rule five of the rules governing 2254 cases provides for the Court to consider prior State [10] proceedings, transcripts, and other matters, I think certainly that is an appropriate matter for the Court to consider in resolving the issue.

THE COURT: I believe those are available. Mr. Stafford Smith, do you have any objections to those? We can make available for you, what we have received, you can review it and make sure it is appropriate.

MR. STAFFORD SMITH: Your Honor, I believe it's very appropriate for the Court to have those in front of it. We have no problem with that.

THE COURT: Let me ask you this. I'm going to give you further opportunity to develop your position because I am concerned since you state this is a novel issue and you are asking the Court to do something in a death penalty situation that's never been done to my knowledge by a Federal court before, tell me what you think we need to accomplish this morning during this evidentiary hearing.

MS. WESTMORELAND: Your Honor, I think for all concerns I think the first thing the Court needs to do is to have an inquiry of Mr. Lonchar on the record in



this case. And the reason I say that is because we have had some questions about what Mr. Lonchar did or did not want to do off and on over the past week. And I think that I'm not calling into question any of the signatures or representations by counsel, but I just think for the record that needs to be done.

[11] **THE COURT:** Well, I agree that's appropriate, and I was going to proceed with that in just a moment when I address Mr. Stafford Smith.

**MS. WESTMORELAND:** And I think, Your Honor, the other question at this point in time is can the Court resolve the legal issue, the abusive suggestion that we have made based on the record before it, and does the Court need additional evidence to resolve that issue.

And once that issue is passed, then if the Court deems it would not be appropriate to dismiss the petition, I think we're certainly at the point of virtually beginning at the beginning of the Petition with answers and whatever would be appropriate to proceed on the merits of the issues presented at that time.

**THE COURT:** Okay. All right. Mr. Stafford Smith, like I said, I'm going to give you further opportunity, Ms. Westmoreland, even if you see other matters that you feel appropriate to address during the hearing this morning, I'll certainly hear from you on that. I proceeded with Ms. Westmoreland because I have a copy of the motion to dismiss before me that the State's position is that there has been an abuse of the writ. Based upon what I know of the case, Mr. Stafford Smith, that's certainly not an unreasonable inference to draw from the record of the proceedings in the case. And if I understand the law correctly, once the State [12] has raised that issue and the record supports that issue, then the burden is upon Mr. Lonchar to either present evidence or to explain why there has been no abuse that would forfeit his rights to a Federal review of his sentence.

And do you agree with me on the law in that regard?

**MR. STAFFORD SMITH:** Your Honor, if I may just briefly say, I'm not afraid I got—Ms. Westmoreland,

this is not her fault but I got her pleading as I arrived at Court today. So I haven't had a lot of time to look into it.

There is a case that's almost exactly on point except it's actually slightly more favorable to our position, that's *Potts v. Zant* 638 F.2d 727. And in *Potts* the facts were, and I remember this because I was twenty-one at the time and a student down here involved in the case, Mr. Potts had actually dropped his appeals twice. And he had been in federal habeas corpus, and he had dropped his own Federal Habeas Petition.

And Judge Anderson writing for the Eleventh Circuit reviewed thoroughly the lower abuse of the writ and sent it back for an evidentiary hearing on the question of abuse. I don't think in this context we can come close to requiring an abuse hearing under the ruling of *Potts* because there are two prongs the State has to show. They have to show or at least allege some manipulation on Mr. Lonchar's part, and let me say very clearly that any allegations up until now of people vexing courts—and I always hate to hear that—but any allegations [13] have been against the next friend. I don't think there have been any allegations against Mr. Lonchar of that.

On the second prong they have to show a nonintelligent and involuntary abandonment of his federal process. There simply never have been any of Larry Lonchar's because as the court held in the court's opinion on February 13th, 1992 that the only question before the court at that point was the question of the next friend's standing. And that was not Mr. Lonchar's wavering.

And I would refer the court to page 443 which is what Ms. Westmoreland referred to where the court said, and I think we were all around at that time, without I think none of us were perhaps thinking where we were going at that point, but the court said, Mr. Lonchar, do you understand that at any time you can change your mind up until the time you are, of course, sentence is executed and bring a habeas corpus petition.

And I do think in the context of everything in the record there has been absolutely no showing of any intentional abandonment of rights, and that's why I feel that it's so important for the court to review the record from State Court where Ms. Westmoreland candidly confessed that there was no specific waiver on the record.

Under the premise of Potts, we don't even get to the question of an evidentiary hearing on abuse unless the state completely finds their way around that. They haven't perhaps [14] had enough time to do that, but they haven't done it. I feel like at this point we are not in the context of having an evidentiary hearing even on that issue. I would have no trouble with the court for its own sake questioning plaintiff Lonchar to see whether he is adhering to this federal petition. I would say there are privileged issues that have gone on, I don't wish to be an obstructionist, I can have Mr. Lonchar's to reveal to the court in camera on the sealed record what those attorney-client privilege things are. But Mr. Lonchar is prepared to state on the record his adherence to this petition.

THE COURT: Okay. Well, I think that's appropriate, Mr. Stafford Smith, and I think that's perhaps what we should accomplish next so we all understand exactly what the factual premises are, and then I would like to address to you further with regard to the Potts decision, I'm somewhat familiar with the Potts decision. And I would like to—which does, of course—I think that's one of the decisions where the language of the Court of Appeals specifically said that once that issue is raised, then the burden shifts to the petitioner. And I would like for, I would like to hear a little more from you on how you distinguish that case from our situation here where the state has raised the issue, but you claim they have not made a sufficient showing in that regard.

Mr. Lonchar.

[15] MR. LONCHAR: Yes, sir.

THE COURT: I'm going to ask if you would take the stand, please, where you can respond to some questions from both the court and counsel.

THE CLERK: Mr. Lonchar, if you would remain standing and raise your right hand. Do you solemnly swear that the evidence you shall give in the cause now pending before this court should be the truth, the whole truth, and nothing but the truth so help you God?

MR. LONCHAR: Die.

THE CLERK: Please be seated and state your name for the record.

THE COURT: I'm going to preface both by questions and counsel's questions, Mr. Lonchar, with two words of caution. First of all, with regard to any matters that might tend to incriminate you, either with regard to the sentence, to the crime for which you were convicted or other matters, you have a right to decline to answer those questions.

And as Mr. Stafford Smith pointed out you certainly the attorney-client privilege, and if that comes up we'll decide then, Mr. Stafford Smith, how to address that, whether in camera or otherwise.

Do you have any questions you would like to ask me about your privilege against self incrimination?

MR. LONCHAR: No, Your Honor.

[16] BY THE COURT:

Q. Now, Mr. Lonchar, you and I have been here before and we discussed your right to bring a petition for relieve of, in federal court to have a federal court review your sentence and your trial and the previous proceedings to see if there was any violation of your federal constitutional rights. And at that time you told me that you unequivocally wished to forego that review.

What is your position today with regard to the petition that's been filed on your behalf?

A. Well, first, for the record, Your Honor, I would like to sincerely apologize for being here. I'm not—



even though people would disagree with me, I'm not manipulating the judicial system. I'm not trying to abuse it. I am prepared to die at 3:00 p.m., and looking forward to it.

But for other moral reasons I've been convinced that I can, I can make some changes, save some people's lives, you know, and that's why I have agreed to this. Even though, you know, like I say, I'm looking forward to 3:00 p.m., but I've been convinced and I honestly believe in it that, you know, if we, if we don't succeed at least, you know, I have to try to not only save my, you know, some death row inmates lives, but there is a lot of public's lives at stake here.

Q. Okay. I'm going to ask you to explain that a little to me so I'll better understand your motivation?

[17] A. Okay, Your Honor.

MR. STAFFORD SMITH: Your Honor, on one level I think this may get into—excuse me, I don't mean to interrupt, Your Honor. The question, I guess one question is whether he signed the federal petition. I have no problem, having spoken to Mr.—the questions the court's going to ask I do think they are going to get seriously into privileged communication between counsel and client. I have no problem with the court doing it, but I would request that it be done in chambers on a sealed record.

THE COURT: Okay. Well, let's wait until we get to that point, and then when we get to that point I will hear what Ms. Westmoreland has to say and I'll decide how to proceed.

BY THE COURT:

Q. Excuse me, you were telling me how you come to change your mind and the reason for that change?

A. Yes, Your Honor. It's the fact that over two thousand people die each year because of organ shortage, and I sincerely believe a death row inmate should have, be given that option when his appeals are exhausted, be given that option where he could be put to sleep and

donate his organs so other people can live. You know, I mean, it's—we're not avoiding our death sentence, we still would be dead, but other people can live, you know. I mean.

Q. Okay. Let me ask you this, Mr. Lonchar. You, your [18] attorneys have filed a petition in court that contains 59 pages, and you signed the verification saying that you have personal knowledge of the allegations in the petition for writ of habeas corpus, and that they are true and correct, and that you seek the relief requested in there. Did you sign that verification, I assume?

A. Yes, Your Honor.

Q. Did you read the petition at the time you signed that?

A. Yes, Your Honor.

Q. Okay. Did you have an opportunity to discuss that discuss that with Mr. Stafford Smith?

A. Yes, Your Honor.

Q. Now, I understand your point with regard to the question of manner of execution so that you can donate your organs, that's the point you were making to me a moment ago; is that correct?

A. That's correct.

Q. Now, a great deal of this petition goes far beyond that, and alleging irregularities and violations of your rights that would affect both your sentence of conviction and your sentence of execution in a prior state court proceeding. Is it your wish to pursue those claims through a petition for federal habeas corpus relief? Do you understand my question?

A. Yes, Your Honor. Personally, I have to agree that I have to pursue this position to follow on what I would like to do, [19] so I would have to say to the court that, yes, I do.

Q. Okay. Now, and you understand the claims that are made and have discussed those with your attorneys; is that correct?

A. Yes, Your Honor.

Q. All right. Now, let me ask you this, Mr. Lonchar, when, now, this was all done, and correct me if I'm wrong on the chronology, but if I understand correctly you filed a petition in state court as recently as last week; is that correct?

A. Yes, Your Honor.

Q. Okay. Now, you had previously withdrawn your, you previously filed a petition in state court, in I believe February of '93, and you have subsequently asked Judge Cook Connelly to allow you to withdraw that; is that correct?

A. Yes, Your Honor, I, I would, I mean, I filed that appeal to stop my execution on February 19th of '93 because, because I was back there in the death chamber, I was all prepared to die, I was shaved, I was informed by telephone call with Mr. Stafford Smith if I continue with my execution my brother who I was living with at the time was going to commit suicide. Even though, you know, I mean, my death was going to be hard enough on my parents, I just couldn't take that chance, you know, to continue with my execution.

But a few months later after resolving this issue, knowing that my brother was going to do this, I asked, I asked to withdraw by petition. Yes.

[20] Q. Okay. Now, at what time, then, did you decide that it was appropriate for you to attempt to delay your execution so that you would have the opportunity to or perhaps have the opportunity to donate your organs?

A. Well, it's nothing, I mean, it's—it's been a few years since, you know, which, it just, you know, so much logic to me. And so, but as far as for the record for the court, you know, I was just informed of this a couple of weeks ago that if I did stay my execution that something could be done, you know, because honestly I didn't believe anything could be done. That's why I was prepared to be executed.

But I've been informed just recently, hold it, Larry, you know, there is something can be done if you just give us this chance.

Q. Okay. Now, and what is it you believe can be done, Mr. Lonchar?

A. Well, hopefully we can change the State of Georgia's law, method of execution from, to lethal injection so, you know, some of us death row inmates can donate some of our organs. But, you know, I'm not optimistic, but, you know, but you know, like I say, we have to at least try.

Q. And you came to this conclusion within the last two weeks; is that your testimony?

A. Yes. Your Honor, that's something that might be able to be done.

[21] Q. And how did you come to this conclusion? What influenced you in that regard?

A. Well, the attorneys have, I mean, because personally I really didn't think anything could be done, but they just pressed me, Larry, if you just stay, give us this option to try, you know. So they convinced me I should for, because of all of these people's lives involved that I should at least try. That's why I'm here today.

THE COURT: All right. At this point, counsel, I'm going to ask if you have any questions of Mr. Lonchar, I'm going to limit those questions, though, to Mr. Lonchar's decision to at this time pursue his petition for federal habeas relief. Now, there may be further testimony, Mr. Stafford Smith, that I think is required of Mr. Lonchar if he is going to successfully refute the government's position that there has been abuse of the writ. But I think I'm going to defer that until I've heard both of your positions on that, perhaps even heard a proffer from you as to what the evidence would be.

Ms. Westmoreland.

MS. WESTMORELAND: One moment, Your Honor.

THE COURT: All right.

MS. WESTMORELAND: Your Honor, I don't think I have anything further to ask Mr. Lonchar, the court's inquiries have covered it.

THE COURT: Mr. Stafford Smith.



[22] MR. STAFFORD SMITH: Nothing from me.

THE COURT: All right. Mr. Lonchar, at this time you may step down.

Unless there is anything else you would like to tell me with regard to your decision in that regard.

MR. LONCHAR: No, Your Honor.

THE COURT: Okay.

All right. Mr. Stafford Smith, do you address in your pleadings the question of the issue raised by the state, abuse of the writ?

MR. STAFFORD SMITH: No, Your Honor, I'm afraid I had not—well, I guess on one level it could have been anticipated, but I hadn't and I would like to do that.

THE COURT: All right. I will be glad to hear from you on that. I have the Potts case before me, and as far as the cases that I recall or have seen or am presently aware of, it's the most—I agree with the premise that it's the most analogous case for the present situation.

MR. STAFFORD SMITH: Thank you, judge. If I may just say this up front in terms of what's been said today, and of course I wholeheartedly concur with what Mr. Lonchar said. And I think he made a very fair assessment of his decision-making process in respect to filing this habeas corpus. At this time I would like to make it absolutely clear that contrary to some newspaper reports there has been no deceit of Mr. Lonchar. I [23] think that's important in the way that he's made the decisions he's made. They have been made based upon some very human and very important issues, and sometimes lawyers get accused of manipulation. I find that personally very hard to take because I think sometimes what we are doing is trying to represent our clients.

With that said, I do think that on one level what the Potts decision makes clear, there are two inquiries. One inquiry is whether there has been an abuse of the writ. And the question really there goes to whether Mr. Lonchar as opposed to Clive Stafford Smith or whomever else has tried to see some legal or tactical advantage or

vex or harass the legal system. And I think very importantly that the court has heard enough right there to meet that prong of the case.

But the second prong is whether there has been an abandonment of federal rights that was knowing and voluntary. And I do think there, too, the record is very clear there hasn't been such a waiver. And I think that's before the court was focused and everyone else was focused back then in 1992 on the question of standing. And I would be less than candid with the court if I didn't say, page two of the court's opinion, the court makes a finding as to waiver. But I think that was a finding made in the context of the discussion of standing.

And I think when you review the text of what the court said to Mr. Lonchar in assuring whether he really [24] understood what was going on, it's quite clear that there wasn't a knowing and intelligent waiver.

And with both of those prongs, I believe the state has to allege and, well, allege that they have met them. And with both of those prongs I think on one level on behalf of Mr. Lonchar we can meet our burden on the record as it stands. I would request if the court's inclined to take that further, an opportunity and we can do this today I sincerely hope, to recess and determine what evidence we would put on. I'm not quite sure, it's rather difficult, there are a lot of questions of privilege that I guess we would have to take up.

But I would request that opportunity for an evidentiary hearing as I think the one thing the Potts case makes very clear there has to be—if the state has come forward with its burden of production, there has to be the opportunity for an evidentiary hearing if the record doesn't make it categorically clear on the face that there is no abuse.

Beyond that, I'm afraid I'm terribly not prepared to address it in depth.

THE COURT: Well, let me ask you two questions. First, what would Mr. Lonchar have had to have done in

this case to have voluntarily abandoned his claim for the federal court's review of the sentence? That would be the first question. And, two, assuming that I find his actions amount to [25] that voluntary abandoning that claim, then what, I am interested in what evidence that you would offer because you are correct, Potts does state the court needs to have an evidentiary hearing over the motivation of the petitioner. And we've established some of that I think with what Mr. Lonchar has testified to.

What in addition to that would be totally up to—since the burden is on you and Mr. Lonchar in that regard and Mr. Matteson, of course, the burden is on you to tell me what you would present for me to then decide whether we need to have evidence on that.

But what about the first question, Mr. Stafford Smith.

**MR. STAFFORD SMITH:** Thank you, Judge, on the first question I think that's settled absolutely and categorically by the state's concession which is at page 21 of the state court hearing last Friday that there has been no waiver on the record in any particular proceeding. I think the state has been very candid in that regard, and quite honestly the reason for that is probably because when this court was holding a hearing on the issue of standing, that just wasn't an issue. And I don't think that there has been an intentional waiver with the full knowledge of what the consequences were on Mr. Lonchar's behalf.

That seems to me to be refuted by the admonitions [26] from this court saying, in fact, you can bring a habeas petition right up to the moment of your execution because he never had had one. The difference in Potts, Potts had had a habeas corpus which he dismissed. In this case there has never been a federal habeas petition on Larry Lonchar's part. With this court—with no fault laid at anyone, I don't think that was an issue back then.

But on the second prong the state has my reading and Ms. Westmoreland, but my reading of the state's position was that they took a candid position that there had been

no waiver. It seems to me that that issue is pretty much settled by the record as it is.

Now, going beyond that, if we were to get to the question of abuse, I'm going to have to think this through a little more carefully than I've had to chance to do in the last hour. But it seems to me the evidence we would be presenting would entail in large part the discussions that Mr. Lonchar has had which he was pretty candid about on the stand that he wasn't out there to vex or harass or delay anyone. He's been the one who's wanted to pursue this. And I can certainly state on behalf of him that he wants to expedite it now. He is not interested in vexing, harassing or delaying anything. He's interested in getting some issues resolved.

I think it would be incumbent upon me to present some evidence, probably going to have to be through myself and then [27] other lawyers who have been involved in this case as to who the ones really have been who have prevented this coming to pass two years ago, three years ago, four years ago. I don't think that's going to be laid at M. Lonchar's feet. There would be something fundamental inequitable probably to blame Larry Lonchar for the actions that were taken not only without his consent, but against his will and a next friend petition.

I'm going to have to think through how we can present that evidence without trampling on certain rights, but that would be the general tenor of it, to show that this hasn't been Mr. Lonchar's doing.

**THE COURT:** Let me ask you this, Mr. Stafford Smith. Here's the distinction I see with regard to the evidentiary hearing in the Potts case. The allegations as you recall in Potts were that there had been pressure asserted on Mr. Potts, I believe, exerted on Mr. Potts to dismiss his federal petition by the prison authorities, other allegations of force, coercion to require him to withdraw his petition.

And what the federal court said in a fair reading of the Potts decision is that his withdrawing it and then his



later re-filing it at the last minute would have been an abuse of the writ, but the court had to fully explore his explanation of why he first withdrew it. And if there were a basis for his having been coerced into withdrawing it by prison authorities or other people, that then that might excuse the, his having [28] first withdrawn it. And under the equitable balancing in determining whether there has been abuse of the writ, it might tip the balance towards no abuse of the writ even though the record on its face indicated that.

Now, I guess what I'm saying is that I have heard nothing in Mr. Lonchar's case that would justify his having previously withdrawn the state court petition and his previously having refused to file for any federal court relief that would require any further evidentiary hearing. And that's why I'm asking you and I want to give you the full opportunity to present that evidence.

Now, with regard to whether that evidence would be presented in camera, I want to hear from Ms. Westmoreland on that before I make any decision on that regard.

MR. STAFFORD SMITH: Your Honor, if I may, and again I'm coming a little off the top of my head, let me give you an example that I think is analogous. In the Potts case you were talking about him being forced to drop his habeas petitions by allegations of what happened at the prison. And I think if the court follows through the chronology of the Potts case, there was no abuse ultimately found in that case, and indeed he won his federal habeas petition and secured new trials in both of his capital cases.

In this case you have exactly the inverse of it. You have Larry Lonchar not filing his own habeas petition, and on [29] one level, and I guess, you know, I would have to concede that this is some form of psychological coercion, and I didn't do this without sincerely thinking about it at the time. But on one level you've heard Mr. Lonchar state quite candidly that when he was facing execution last time, I told him that his brother was going

to commit suit suicide, and that's the truth. And that was the truth as I've heard it.

Now, on one level that goes very importantly to show Larry Lonchar's good faith in terms of what he's been doing and in terms of how he hasn't been manipulating the system. That he's had very, very good human reasons for doing what he did then.

Now, you already heard, also heard from Mr. Lonchar in some of the other proceedings where he determined he really couldn't do anything worth while in his life, and how he came—and we can certainly elaborate on this—to determine that it was worth proceeding through state and federal court on his own behalf. Now, that's important to show again that his motivation hasn't been abuse of the writ to vex, harass and delay. His motivation has been very sincere. And I think what's important to set that in context again is a general proffer—and I can only generally proffer it until the court rules on other things—is all the back and forth that has gone on between Mr. Lonchar and his lawyers and indeed the next friend lawyers to show whose motivations were what.

[30] I can only say standing here I think Mr. Lonchar has been very genuine throughout his determinations, and they have been heart wrenching ones, as to what he should do. I can state categorically from my perspective if I was standing up there under oath, my perspective has been that he has never been manipulating anybody. I think he's received different advise that's led him to make different choices, but I think it's important for the court to hear that evidence.

THE COURT: Well, first of all, it appears to me that the question is not so much his motivation for manipulating the system, but the question is whether he has intentionally manipulated the system. And he may have done that perhaps through the best of motivations, but I don't know that it's a subjective inquiry in that regard.

So what I'm saying is, if he intentionally refused without justification to previously seek a federal habeas review of the sentence, if he previously voluntarily with-

drew his state habeas review of the sentence and then allowed the process to continue, and for whatever motivation intentionally manipulated the system in the sense that he filed at the eleventh hour, then a petition for habeas review in federal court, doesn't that amount to the same thing whether his motivation is, regardless of his conviction.

MR. STAFFORD SMITH: There would be two questions there. This is the first day Larry has ever been in a position [31] to seek federal habeas corpus because there has never been a ruling on the state petition. I guess one level he could have filed without state post conviction proceedings because the court would have remanded because of exhaustion of remedies.

But never before has this court been in the position of saying, Mr. Lonchar, do you want to go forward with the federal habeas petition. Consider the context back in 1992. If Mr. Lonchar had said, yes, I want to go ahead with the petition, then this court could not have gone ahead and adopted that next friend petition and proceeded with it, Mr. Lonchar's position because nothing was exhausted. He had never been through state court. I think that's the first question.

The question is whether he's ever been in the posture of actually dealing with the federal system before. On the court's statements at the beginning of the hearing, that is a very, very rare instance when no one ever gets the first bite at that apple is a very valid one.

But then moving back to the second question, the objective-subjective matter. I think there are very few positions in any aspect of the law where a waiver is an objective matter. You may go to search objective criteria, but even *North Carolina v. Butler* which is probably the worst case on waiver that there is the Supreme Court from my perspective, the Supreme Court makes it very clear that the ultimate [32] determination is a subjective one. You can look at objective factors, but the subjective determination of waiver is the ultimate question.

Mr. Lonchar has had various advice from various judges which I think led the state to conclude candidly last Friday that he hadn't made that waiver. I've got to reserve this because that's a very interesting question that the court comes up objective one, subjective one, first time I've ever seen it. And I somehow doubt that it would be purely objective.

THE COURT: We're not talking about the waiver, the question of the waiver being objective or subjective, we're talking about the manipulation of the system.

MR. STAFFORD SMITH: But again I think that is a resulting in the waiver of all federal remedies to have some subjective impact. I mean, we would clearly accept, wouldn't we, that if he had been incompetent then whatever he did wouldn't have made a difference. And so there has got to be some level of subjectivity to it. Because if an incompetent person does objective acts that the court might say result in abuse, no one is going to say that that's an abuse of the writ.

So there has to be a subjective element to it. Now, quite what that is is a tricky little question, and I would like the chance to research it. But I'm fairly, fairly [33] comfortable in saying there has to be an element of subjectivity to it.

THE COURT: All right.

MR. STAFFORD SMITH: Thank you, Judge.

THE COURT: Ms. Westmoreland.

MS. WESTMORELAND: Your Honor, just a couple of things I would like to point out, particularly in relation to the analogy to Potts. Potts is a pre-McClesky versus Zant case, so I think when you start looking at Potts dealing with subjective matters, I think my recollection is if I'm not badly mistaken McClesky came out after Potts. McClesky talks about an objective standard of the abuse of the write, is there something that prevented the issue from being raised. So that on its face I think is a distinction between Potts and where we find ourselves, which is why I think it's not, it's not directly analogous.



It may provide some support, but it is not directly analogous to the situation the court finds before it.

And I think McClesky lends support to the argument that the issue of manipulation or abuse or whatever you want to call it has to be made on an objective determination, has to be an objective assessment of what has going on, what has been done, and what has not been done and if there is some reason that this could not have been done sooner. And I don't think there is anything before this court that suggests it could not have been done sooner. [34] When we talk about—and let me clarify something specifically that has been discussed in pleadings since last week. Yes, I told Judge Smith on Friday that I knew of nothing in the record before that court that would require him to find a waiver of the state habeas corpus proceedings. And I still don't find anything, any state habeas corpus proceedings that talk about a waiver in the sense of a knowing and voluntary waiver of the state habeas corpus act. We weren't talking about federal habeas corpus petitions. We weren't talking about anything that happened in this court. We were talking about a voluntary dismissal as a result, and has Mr. Lonchar done anything under state law that would waive the right to file that petition. It's a different question from what's before the court today.

So Mr. Smith's correct, I did state no waiver in that context. But we weren't, we weren't even here yet. At that point in time we had no indication that we would ever be in a federal petition proceeding before this court. So I don't think that's—

THE COURT: Tell me again the context in which you consider and represented to Judge Smith there had been no waiver.

MS. WESTMORELAND: We were talking to Judge Smith about whether there had been a waiver to file a stay, habeas corpus petition, the issue came up and I believe the argument [35] was whether the voluntary dis-

missal when that prior petition, whether the next friend petition in state court barred him from pursuing another state habeas corpus. And I referred to the prior transcripts and neither one of the state transcripts had any colloquy with Mr. Lonchar about subsequent actions, the type of colloquy that this court engaged in in federal proceedings was not done in those state habeas corpus actions, that type of colloquy did not occur, and I could not find a reference in either one of those proceedings to that occurring.

When the question came up that the state habeas corpus action Mr. Lonchar filed, I requested it be dismissed with prejudice. And upon further research and looking into state law based upon the applicability of the Civil Practice Act, it appeared in a civil proceeding an individual could dismiss a claim, a proceeding without prejudice once at the stage where we found ourselves at that point. And I was, I acknowledged to Judge Smith that that dismissal without prejudice, it was that a dismissal without prejudice in the sense when you start talking about a knowing and voluntary waiver, a waiver of a right to actually file a subsequent petition.

I don't believe I ever conceded anything about waiver in any other context. That just wasn't the issue before the court at that point in time. Certainly was not the intent of [36] what I was saying at that point.

THE COURT: Well, given that I think we all agree that the general rule is that a state prisoner sentenced to execution or otherwise would be entitled to one round of federal court relief to review the sentence, and that there must be some prior abandonment of that right for him to have been found, for him to be found at this point to abuse the writ.

Now, what standard would you argue that applies to Mr. Lonchar having abandoned the right? And then I'll tell you what troubled me in the Potts situation where there was an actual petition filed and then he wanted to withdraw the petition, and he was questioned by the court and established that that was a voluntary decision

on his part, even though there later was some question about the voluntariness. It seems to be that then that's a standard—you know, these are cases where the result is irrevocable so you need something that you can depend upon—that's a standard that you can apply.

There has never been that in this case. Mr. Lonchar has never actually filed a federal petition for habeas corpus, so he has never come to the point where he said, I want to withdraw it, I want to release it. What standard would you apply to determining a voluntary abandonment in a case such as this.

[37] MS. WESTMORELAND: Your Honor, I think—and the reason I want to get back to McClesky—I think we need to be careful in dealing with concepts such as abandonment and voluntary relinquishment of rights because a lot of that terminology derives from pre-McClesky cases, it derives from Sanders and Fay versus Noia and those types of cases which for many context it is, most contexts actually habeas corpus relief really don't have the same application that they did at that point in time.

McClesky gets back to an objective standard for abuse of writ, we have objective standard for procedural default. I think when are looking at abusive conduct in any fashion there needs to be some objective focus, objective inquiry. I think this court can look at what took place before this court in 1992 when Mr. Lonchar sat here and said, yes, I understand exactly what the consequences are. I'm fully aware of what's going on, and I don't want to do this. I think although it's not a withdrawal of the petition, it's a similar type of abandonment in the sense he knew he could do it, he chose not to.

And we come up again last week, there is no indication Mr. Lonchar was unaware of the proceedings, and they didn't know what was going on. He did, again, did not choose to participate at that time. He did go into state court at that time and had said he did not want to file the state habeas [38] corpus proceeding before com-

ing to court. I believe the court has a transcript has a transcript of that proceeding as well.

THE COURT: Okay. Let me ask you this, let me ask you a hypothetical question. Say in the previous competency hearing where it was determined that the next friend didn't have standing, and that petition was dismissed on the basis of no standing. Say there had been no inquiry as to abandonment, voluntary or otherwise, simply had been a straightforward determination based upon the evidence presented that Mr. Lonchar was competent, therefore, the next friend had no, had no standing to proceed. Would you still say that this was a case where there was an objective abandonment of the rights?

That's what I'm concerned about, is it the whole spectrum of circumstances that's occurred over the last six, eight years?

MS. WESTMORELAND: Your Honor, from our position it's the entire set of circumstances. It's not just what happened before this court in 1992, although that certainly I think plays a significant role in this case because we do have, we do have an inquiry in this case. But it's more than that.

It's that petition not being joined in, which not only went to this court, went to the eleventh circuit and the U.S. Supreme Court on a cert petition, although that was rejected. And it's the coming back around again, last week. And we did this all over again. There has been no assertion [39] that this is something that couldn't have been done.

And the question of whether Mr. Lonchar had been advised of the significance of whether he thought there was some reasonable chance of getting the method of execution changed I don't think plays into this analysis. We're talking about something, he could have stopped this proceeding, he could have filed a federal habeas corpus petition not only years ago, he could have tried it last week.



THE COURT: Well, but that's what, what I'm asking, is there any rule that you can state that would adequately describe when that abandonment has occurred other than just simply reviewing the totality of the circumstances? Judges are like lawyers, they like specific rules that can be applied, particularly in cases of this seriousness.

MS. WESTMORELAND: Sure, and I agree with the court, I think specifically is always the best way to go if you have one. I think the only thing the court can do is draw from the cases that are out there. Look at McClesky which requires an objective assessment of whether there are matters which prevented claims from being raised. I think that translates in this case is this something that prevented Mr. Lonchar from joining in one of the prior two petitions.

It's not like we didn't have a petition filed at all, it's not like we didn't have hearings before this court where Mr. Lonchar was here. If that was the case, we might have a [40] different situation. But he was sitting here for three days. It wasn't like he was unaware of the situation or unaware of the consequences or unaware of what was going on. The option was there. The option was there again last week.

I think those were objective factors before this court that shows he had the chance to do so, and he didn't. That to me is the objective manifestation of the abusive conduct the cases look at.

Again, I agree, this is not a traditional abuse of the writ case. I'm certainly not asserting that it is. I also don't think it's the same thing that Potts did because the legal standard I think is different from what Potts had.

THE COURT: Let me ask you one final question, Mr. Stafford Smith wishes to tender evidence on the record but in camera which would exclude both the respondent's counsel as well as the public from the information, and it would be sealed and made part of the record. What is your position.

MS. WESTMORELAND: Your Honor, I would object to that proceeding. The only thing I could think of analogies it to when I was sitting there, Mr. Stafford Smith's argument is that we're looking at voluntariness. And I would point out to the court that voluntariness came up consistently in the three days before this court. I believe Mr. Meers consistently argued that the state had the burden of proving a knowing and voluntary waiver at that point in time. So we debated the [41] question of waiver and voluntariness. But if that's the analogy that petitioner's counsel seeks to draw, it's similar to challenging the voluntariness of the guilty plea.

We are entitled to know what advice the defendant was given if we're intending to go to his subjective thought processes, I think the respondent is not entitled to know about those, but to cross-examine Mr. Lonchar about his thought processes, what he did, when, why he did it, what advice was given. If that's going to go into the record I would certainly take the position we should have the opportunity to question him about those matters. I appreciate the attorneys with the attorney-client privilege. I certainly don't take a suggestion of waiver of that privilege lightly, but under these circumstances I would submit that's just not the way this case should be handled.

THE COURT: All right. Mr. Stafford Smith, on that issue I think I agree with Ms. Westmoreland. I'm going to, I want you to have the full opportunity to present whatever evidence you would have to present under the ruling in Potts, but because of the significant public interest in a case of this sort, I think that in camera sealed presentation would be inappropriate. And, also, I also want to show appropriate respect for the attorney-client privilege, but by putting this matter into issue, Mr. Lonchar I think has to that extent waived the attorney-client privilege to any relevant evidence [42] that would show that he had not abandoned and that he had not intentionally manipulated the system.

So at this point if you want to offer some evidence in that regard, then I will afford you the opportunity to at least make a proffer as to what you would like to offer. Although I think Mr. Lonchar clearly stated his reasoning when he testified.

MR. STAFFORD SMITH: Thank you, judge. On that, in that regard, I'm afraid they were asking some other things in terms of—I think I'm probably the one, I've testified before the court once before, and I think I'm probably the one who is most put on the spot by this because it's probably, you know, me that ends up having to provide the testimony.

If, if it's not asking too much of the court, I would request the opportunity to think this through in terms of whether I will need to get someone else, Mr. Matteson, he has been pretty involved in all of this stuff as well, to try and help us sort out exactly what, what our obligations are. Maybe we can do it in a written way, too, that we can think through.

I'm not trying to put the court on a time spot, I'm just, even maybe ten minutes to think about it.

THE COURT: I'll give you ten minutes, Mr. Stafford Smith. We'll take a brief recess, that will give you an opportunity to talk with Mr. Lonchar. I will say the attorney-client privilege is like any other privilege, it can [43] be waived by Mr. Lonchar.

MR. STAFFORD SMITH: I understand, I appreciate it.

THE COURT: We'll be in recess until 12:25.

(Recess 12:13 to 12:25 P.M.)

MR. STAFFORD SMITH: Your Honor, as far as the available testimony right here, I guess it's me. I will be happy to take the stand or state in my place or however the court and counsel would like to do it.

THE COURT: I will allow you to state it in your place, Mr. Stafford Smith. If Ms. Westmoreland wishes to ask you questions I would ask you to stake the stand.

MR. STAFFORD SMITH: Thank you, in terms of the general tenor, I guess, my dealings with Larry Lonchar, it would be general, and the way I see it as it's relevant to the question of abuse of the writ, first, I feel that the court did have the benefit of the hearing back in 1992. And from my experience with Larry and developing evidence on his behalf I would also say that it's important for the court to take into consideration the next friend petition that was filed last week and Dr. Dennis Herendeen's statements and some statements Larry's made to me about whether the state doctors were able to fully evaluate him in the two hours or whatever that they saw him, and whether just my asking him if he had ever been manic they could possibly really assess that.

I find this very uncomfortable, obviously, to talk [44] about this, but I think it's important for the court to accept by way of proffer that I think there is substantially more evidence of Larry's depression and manic experiences over the last three years than the court heard in 1992. And I feel that Larry would concur with that. And that goes to at least some of his mental state on why he did what he did.

I think it's important as I previously proffered to make it absolutely clear that the reason Larry changed his mind at the last execution was indeed the statement that I made to him about his brother, which I feel was a fair and accurate thing. But it put him in a very, very difficult position, and I didn't tell him that without a lot of soul searching as to whether that was the appropriate thing to do.

I think it's also appropriate for me to say that the first time any lawyer to my knowledge has ever discussed actually filing a federal petition with Larry was yesterday, and was actually Mr. Matteson, not me, who discussed that with him. I have never in the last however long discussed the filing of a federal petition with Larry because we just never were in that situation.

I think it's important to say, also, that I've advised Larry consistently over the years that I always felt there



would be no problem with a federal petition, and I told him, and this puts you on the spot, I realize, I told him that I felt there was no legal bar to him filing a federal petition [45] since we had never been there. I felt at least was out of the game, and we were in an article three court that he had an absolute right, that he had a right to do that, that wasn't something that he had waived by any action or inaction.

So as a result, that was a result of that. I think there are other arguments going to Larry's decision-making, none of which I think are dispositive but some of which I think are important in terms of where he makes his determinations. One of which very clearly is and—this isn't the only one—but one of them is that life is very difficult for Larry down at the penitentiary as summer approaches because it's so hot, and he finds that very difficult to deal with, some of the cycles—in addition to mental problems—and I feel like, you know, I had hate to talk about that, but I feel like I have some of the same traits Larry has. But that has played into some of the, the environment down at the prison.

I think the key issue, though, is that really—

**THE COURT:** Let me stop you, Mr. Stafford Smith. Are you proffering testimony that Mr. Lonchar with regard to the conditions at the prison?

**MR. STAFFORD SMITH:** Of my discussions with him in terms of when summer approaches Larry gets more likely to not want to do anything because I think he—and that's not the only consideration, but I do feel like that's an important one. I think the most important consideration, though, and [46] this court found in hearing before is that Larry suffered from real depression, which has made him see no hope and no purpose to life.

And, again, one of the things that has given him hope and given him purpose is finally the notion when I consulted with him and when other lawyers consulted with him recently that we genuinely think there is a way through legal battles and through getting legislation spon-

sored in the Georgia House that he can do some good with his life.

Now, that goes to his whole analysis as to whether it's worth living and dying on a level of depression. And we're talking about what the court I think found at the last hearing as a diagnoseable DSM-4 mental state which is playing into the determination process. And I think that's very important in determining whether he's abusing anything, that for the first time in life this last week, and what Mr. Lonchar said on the stand is absolutely true from my perspective of seeing him, he has seen a hope to life, a purpose to life. And that gives him reason to live, and that gives him a purpose to litigate all of his constitutional rights.

And so in terms of just my work with him and my analysis of why he does what he does, I think that has played an absolutely fundamental role, and that never before has he been sitting there saying, I'm foregoing constitutional rights because he has manipulating any system. He has always been [47] doing it because he sees absolutely no purpose to life. Finally he sees a purpose where he feels he can do something very positive for other people.

That would be the general scope of, I think what I would testify to. I do think that it would be relevant if the court feels that the State has plead both forms of abuse and met the thresholds that Potts set out, that we be given the opportunity at some point to present other evidence, I would think including Dr. Herendeen and his experiences consulting with Larry over the last year-and-a-half.

**THE COURT:** All right.

Ms. Westmoreland, I would be glad to hear any comment you have on Mr. Stafford Smith's proffer. Do you have any questions of Mr. Stafford Smith with regard to the substance of his proffer?

**MS. WESTMORELAND:** Just one question in light of what he said and in light of my recollection of what

I thought occurred at the prior hearings in this court is whether I understood Mr. Stafford Smith to say that he had never discussed even then the prospect of filing a federal habeas corpus petition. That wasn't my recollection of what was said in 1992. I just wanted to clarify that with Mr. Stafford Smith.

MR. STAFFORD SMITH: As best I recall it's been a long time, but as best I recall the, we obviously discussed [48] with him a next friend petition, there is no doubt about that. But I don't think legally we were ever in the situation of saying, look, his federal petition should be filed for the reasons I've previously stated. I don't think before today there has ever been a prior federal petition—I've never gone down there to Larry and said, look, here is a federal petition, sign it or don't sign it today.

Now, we talked about that in State court, but I've never done that in the context of a federal petition.

THE COURT: Is that responsive to your question, Ms. Westmoreland?

MS. WESTMORELAND: Partially. I guess the other inquiry is because again I think I get back to, I thought I recalled some kind of discussion in the context of next friend petition. I have need to clarify, was there some discussion issued at that time?

THE COURT: Let's do this, I'm going to ask you to take the stand, give Ms. Westmoreland an opportunity to ask you questions.

Mr. Clive Stafford Smith, petitioner's witness, upon being first duly sworn, was examined, and testified as follows:

#### EXAMINATION

BY MS. WESTMORELAND:

Q. I appreciate the position you are in, Mr. Stafford Smith, [49] I just wanted to clarify a points in 1992 I believe you were at the hearings before Judge Camp, at least a part of the time, as I recall?

A. For the first two days.

Q. First tow days. And I believe there was some inquiry made at that time—and I don't have the transcript so I don't recall specifically—did you discuss with Mr. Lonchar at that time the possible issues that could be raised in a petition in any court, first of all?

A. Actually, I do have the transcript and I wasn't here for that day. That was the third day, I think it's starts at page 437 so I wasn't here for that.

Q. I believe that colloquy was earlier, but just in general aside from the hearing, did you discuss it at that point in time the issues of raising—I'm talking about the timeframe when the next friend petition was pending?

A. We discussed the possibility of the next friend petition for years. I wanted Larry to file proceedings, honestly, I can't recall. I don't recall ever talking about a federal habeas petition in his name. We discussed the next friend petition.

Q. And you discussed constitutional issues that he could raise in a petition in some court, then?

A. Right.

Q. And I believe that he has said in the past he's been made [50] aware of these various issues and he was told I guess by you or by others that they were possible issues you thought had merit to them, you discussed that with him; is that correct?

A. That's true.

Q. And so whether the word "federal petition" was used or not you did have some conversations about pursuing post conviction relief with Mr. Lonchar?

A. In State court we certainly often discussed.

Q. Did you limit those discussions to just filing a State petition?

A. No, we talked about federal litigation. And what I said before is the honest truth that, you know, I cited one case, yes, the Potts case in our petition. But I didn't put a section in there on abuse of the writ. I never felt that Larry had waived his right to proceed in federal court in any sense. And I am sure I've communicated that to him. Not in the context—I hasten to add—of



Larry sitting there saying well, I can manipulate the system now. I was just saying, look, we have these options available. You can change your mind. And I feel like that's been consistent advice I've given him.

Q. So that's been advice you've given him over how long a period of time?

A. Well, certainly I think since 1992 I have consistently taken the position that you can stop this in federal court and [51] go ahead with your writ asserting your right.

Q. So you were taking that position with him then in 1992 that he could stop it at that point in time and go forward with federal petition?

A. Again, I'm not sure, but the niceties of it I think there is the question of going through State court first, but certainly I've always felt he could go to federal court and get a hearing. I haven't always said that about State court.

Q. And you discussed the issues with him, I believe did you represent him at the, on the cert petition after direct appeal?

A. I did.

Q. Is that correct. And so you had been meeting with him since that time, I assume?

A. Talking.

Q. And talking about that the issues that could be raised since that time?

A. Right.

Q. Do you recall when the question of the challenge to electrocution, the organ donation, has that been a part of discussions over the time?

A. No. That really come up, I represented Nicky Ingram, as you know, a couple of months ago. And, you know, I have to say that one of the things that I felt that was so important to Larry is, you know, I've always felt this about him, that he has a purpose to life and can do something positive. And one [52] of the things I've been trying to search for is something we could agree on that he could do positive. That's been a recent discussion.

And the Ingram thing, what I meant by that of course you recall I represented Nicky and ended up challenging the execution.

Q. Several weeks ago?

A. Right.

Q. And so those discussions were occurring along that same time with Mr. Lonchar?

A. No, I didn't see Larry then. I think the first time I saw him after that, I'm not sure about this, but I think it was a couple maybe three weeks ago from now.

Q. But you didn't wait, this wasn't something that just came up this past Friday?

A. In terms of—no, I think that the ongoing discussions with him about litigating that issue first came up when I wrote to him about—and I guess the date would be reflected in the record—about joining, substituting parties in the lawsuit in federal court on the Ingram case.

Q. Sometime maybe in April I believe of this year?

A. April or May, yeah. And in that context he was willing to do that. There is a 1983 act gradually that built into the notion—when I first talked to Dr. Kevorkian about ten days ago, how that could develop not only into—from the [53] electrocution and lethal injection, but also in helping save people's lives through the whole organ donorship business.

Q. So that's a matter, discussions have been going on since the time he became involved and was substituted in the Ingram case?

A. It's been developing. I've learned a lot about organ donation in the last couple of weeks.

MS. WESTMORELAND: I don't have any other questions.

BY THE COURT:

Q. You had discussed with him his likelihood of being able to delay the proceeding by filing a writ in federal court?

A. Not delay it. What I've discussed with him is I feel like there has never been an impediment to federal

court. I never felt there was a legal impediment to State court, but legally I've had an assessment about some political judgments that may be made. That's my honest opinion.

Now, I've always felt that an article three court—and this is what I've told him. I'm not trying say anything beyond that—but I've always felt that he was going to be able to vindicate his rights in federal court.

THE COURT: And you have so advised him over the years?

MR. STAFFORD SMITH: I have.

THE COURT: All right. You may step down.

MR. STAFFORD SMITH: Thank you.

[54] THE COURT: All right. Counsel, anything further that we can accomplish this morning?

MR. STAFFORD SMITH: No, thank you, Judge.

THE COURT: Ms. Westmoreland.

MS. WESTMORELAND: Your Honor, I don't believe so.

THE COURT: Ms. Westmoreland, in view of the time, there have been some, as I think you and I both have reached, agree there are some novel issues here, it's going to take me some time to work both through the record and to look at the cases you and Mr. Stafford Smith have discussed. I'm going to temporarily stay the execution and give me an opportunity to do that. I will try to enter a ruling as soon as possible with regard to the—at least the motion for stay and the preliminary questions presented. Mr. Stafford Smith were you—

MR. STAFFORD SMITH: Yes, please, Your Honor, if we could, if the court could advise us through somebody if we can run back to our offices and try and submit memoranda on a couple of these issues, I would like the opportunity to do that.

THE COURT: All right. When would you be able to submit that?

MR. STAFFORD SMITH: Depends on what quality they are going to be, I can get whatever deadline the court sets.

THE COURT: I'm going to give you a deadline of say [55] 3:30 this afternoon.

MS. WESTMORELAND: Your Honor, and I don't mean to put the court on the spot because I know as soon as I get up the warden is going to ask me in context of, for their purpose at the prison and whether we are still operating within this execution window. And I am assuming from the court's indication at least this minute we are, but certainly not for this afternoon. That's, again, I'm not putting words in the court's mouth, I just know I'm going to get asked that question.

THE COURT: You know, these are things that, it may be that when I look at the situation I feel differently about it, but I am going to begin working on this immediately. You are certainly not talking about this afternoon. You may still be, if I deny the request for a stay or grant the request for a stay, you may still be. I'll try to rule on that very promptly, and I think that's all I can say. If I can rule on that today, I will. If I can't, I'll simply have to work through the issues until I can rule on it.

But I will let both you and Mr. Stafford Smith know as soon as possible, fax you a copy of my order so you can take whatever you consider to be appropriate steps.

MR. STAFFORD SMITH: Your Honor, I have a proposed order which we may just want to put the word "temporary" in. If the court needs a written order, I think its—

[56] THE COURT: I'm going to ask you to give that to Ms. Bankhead, and I'll take a look at it.

MS. WESTMORELAND: Your Honor, I believe the Marshall just wanted to be sure that Mr. Lonchar can be returned to State custody. We don't need his presence.

THE COURT: Mr. Lonchar can be, his presence is no longer required, he can be returned to State custody.

MS. WESTMORELAND: Thank you, Your Honor.

(Proceedings concluded)



## STATE'S EXHIBIT NO. 99

DEKALB COUNTY POLICE DEPARTMENT  
Field Interview

Case No. 86-259435

Person Interviewed: Larry Lonchar

Address: \_\_\_\_\_

DOB: 9-3-51 Sex M Race B Hgt. — Wgt. —

Employed by: \_\_\_\_\_ Address: \_\_\_\_\_

Phone Number: (Residence) \_\_\_\_\_ (Business) \_\_\_\_\_

Spoke with Lonchar in an interview room at CID, after bringing him there from the DeKalb Jail. I read him a Miranda Rights and Waiver Form. He agreed to talk with me, but refused to sign the form, saying he wasn't signing or writing anything. He said he'd talk to me but that he wasn't going to give me anything.

I told Lonchar who I was and that I wanted to give him an opportunity to tell his side of the story. He said that we both knew that would be a waste of time, that we had enough on him to put him in the electric chair and that he had come back to Georgia to die. I asked him what he meant and he said that he wasn't going to put his family and the victims family through a trial, that he was going to plead guilty and die in the chair. Also, that if they didn't give him the electric chair he would kill himself.

When I tried to get Lonchar to talk about the murders, he said that his family had asked him not to say anything yet and he was going to respect their wishes. I tried to get him to talk about the incident and all he would say

was that it was pointless to tell anyone about it, that he just wanted to get it over with and die.

I asked Lonchar why he wanted to die and he said that if he could do that kind of thing to people, then he deserved to die. He said that he couldn't understand how he could have done that and he just wanted to get it over with.

I asked Lonchar why he had killed the woman and he said that that wasn't like him. I said that whether or not it was like him, it was him that had killed her. He said that he just didn't remember that well. I played him the tape of Ms. Sweat's call to 911 and he began shaking and trembling. I asked him how he could have done that and he said he just didn't know.

Lonchar then told me again he wasn't going to say anything, until he was able to fully convince his family that he had done this. He said that they had bought a cemetery plot for him, at his request, but that they weren't fully convinced. He said that, once they were convinced, he would tell me everything and get it over with.

At this point, I left the room and wrote this interview sheet. I then returned Lonchar to the jail.

Investigator: Buis, C. E.

Date &amp; Time: 11-1-86 20:17

Location of Interview: CID

**ORAL STATEMENT OF DEFENDANT LONCHAR**

At the time of his arrest in Texas on 10/20/86, Defendant Lonchar told the arresting officers: "Go ahead and shoot me! Shoot me!"

**SUMMARY OF STATEMENTS MADE BY  
LARRY LONCHAR DURING TELEPHONE  
CONVERSATIONS WITH AMBER WATSON  
SUBSEQUENT TO HIS ARREST**

Larry telephoned me at home on two occasions.

During the the first conversation Larry made general conversation about the jail and how noisy it was all the time and that it was difficult for his mother to visit because of the stairs and having to wait so long. Larry's mother had told me that Larry blamed his brother Paul for what had happened so I asked Larry why he blamed Paul. Larry said it was a long story and would not say anymore about that. I told Larry that the last time I came by his apartment, (10/7/86) I had sensed that something was wrong as he was very nervous and didn't ask me to sit down as he always had previously. Larry said that Mitchell was in the apartment and he didn't want me to know he was there.

I told Larry that I knew he had been depressed and that was why I had wanted him to go to Clayton Mental Health. I reminded him that he had an appointment scheduled for 10/15/86, two days after everything had happened. I told Larry that he was very intelligent and that I had really hoped he would make it because he had already spent most of his life in prison. Larry said he was sorry he had let everybody down. I told Larry he had let himself down.

During our next conversation Larry said he was ready for all of this to be over and that he was ready to die. He also said I was on the prosecution witness list. Larry said his attorney was angry at him because he would not cooperate with him but that he just wanted to plea and get it over with but that his attorney wanted a trial. He said his attorney got mad and walked out on him because he would not tell him anything. Larry said even the first news reports said three people were seen leaving the



scene. I told Larry that if that was true he should cooperate with his attorney and tell him who else was involved. Larry said he couldn't do that because they were very important and "high-up" people in Atlanta and that there was a lot more to this than anybody knew. Larry said Wells was probably going to be a witness against him but that he wasn't that way and was not going to tell them anything. I told Larry if there was somebody else involved he should be cooperating rather than worrying about somebody else.

Larry kept saying he just wanted it to be over and could not understand all of the delays. I told Larry I may call the DA to see what was going on as I needed to keep the Parole Board informed and that if I did and found out anything that I would tell his mother. Larry then told me that everything he had said to me was confidential and that he didn't want me to repeat any of it because he was not going to help them.

/s/ Amber Watson  
6-5-87

[Filed Jun. 29, 1995]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 95-8821

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LARRY GRANT LONCHAR,  
*Petitioner-Appellee,*

versus

ALBERT G. THOMAS, Warden,  
Georgia Diagnostic and Classification Center,  
*Respondent-Appellant.*

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Appeal from the United States District Court  
for the Northern District of Georgia

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Before TJOFLET, Chief Judge, COX and DUBINA,  
Circuit Judges.

BY THE COURT:

Albert Thomas, warden of the Georgia Diagnostic and Classification Center, has filed an emergency motion to vacate the district court's indefinite stay of the execution of Larry Grant Lonchar. Lonchar has responded to the motion. For the reasons given below, we vacate the stay.

### I. Procedural History

An explanation of our ruling must begin with a review of the procedural history of Lonchar's case.<sup>1</sup> Lonchar's conviction for murder and sentence of death were affirmed on direct appeal in July 1988, and the Supreme Court denied certiorari in January 1989. *Lonchar v. State*, 369 S.E.2d 749 (Ga. 1988), *cert. denied*, 488 U.S. 1019 (1989). Lonchar refused to file a collateral attack on his own, and his execution was scheduled for March 1990. His sister, Chris Kellogg, then petitioned a Georgia superior court for habeas corpus. Finding Lonchar competent to bring a petition on his own, the superior court dismissed the petition for lack of standing. The Georgia Supreme Court denied a certificate of probable cause to appeal the decision. *Kellogg v. Zant*, 390 S.E.2d 839, *cert. denied*, 498 U.S. 890 (1990). Lonchar's sister then filed a 28 U.S.C. § 2254 petition in federal district court. Finding after a full evidentiary hearing that Lonchar was competent, the district court dismissed the petition for lack of standing, and this court affirmed. *Lonchar v. Zant*, 978 F.2d 637 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1378 (1993). Lonchar opposed the petition and so stated before the federal district court.

Following the failure of his sister's petitions, the State scheduled Lonchar's execution for February 24, 1993. That day, Lonchar consented to the filing of a petition for habeas corpus in his own name in Georgia superior court. The superior court stayed the execution. A few months later, Lonchar sought to dismiss the petition. Finding Lonchar competent to waive his rights, the superior court dismissed the petition without prejudice. The Georgia Supreme Court denied Lonchar's attorneys' motion for certificate of probable cause to appeal.

<sup>1</sup> This procedural history is taken from records on file in this court from this and prior proceedings.

On June 8, 1995, an execution order was entered for Lonchar's execution between noon Friday, June 23, 1995 and noon Friday, June 30, 1995. The execution was scheduled for 3:00 P.M., June 23, 1995. On June 20, 1995, Lonchar's brother, Milan Lonchar, Jr., sought habeas relief on Lonchar's behalf. After a hearing at which Lonchar declared his opposition to the petition and his wish to die, the Georgia superior court found Lonchar competent and dismissed the petition for want of standing. *Lonchar v. Thomas*, No. 95-V-128 (Super. Ct. Butts County June 21, 1995). The Georgia Supreme Court denied Lonchar's brother a certificate of probable cause to appeal. Lonchar's brother was similarly unsuccessful in federal district court. *Lonchar v. Thomas*, No. 1:95-CV-1600-JTC (N.D. Ga. June 22, 1995). On June 23, this court denied a certificate of probable cause to permit his brother to appeal the dismissal. *Lonchar v. Thomas*, No. 95-8799 (11th Cir. June 23, 1995). The U.S. Supreme Court denied certiorari. *Lonchar v. Thomas*, No. 94-9773 (U.S. June 23, 1995).

On June 23, however, the day his execution was scheduled, Lonchar again—as he had on the day of his scheduled execution in 1993—consented to the filing of a petition for habeas corpus in his name and a complaint under 42 U.S.C. § 1983. The Butts County Superior Court temporarily stayed the execution. At a hearing in Butts County, Lonchar informed the judge that he did not want a writ of habeas corpus. (Tr. of 6/23/93 hr'g at 6-7.) Lonchar explained that he still wished to be executed, but he hoped to delay the execution long enough for the Georgia legislature to consider changing Georgia's method of execution from electrocution to lethal injection, so that Lonchar could donate his organs. (*Id.*) The state court dismissed the habeas petition on June 26, 1995, essentially finding that it was an abusive writ brought for manipulative purposes. *Lonchar v. Thomas*, Nos. 95-V-332, 335 (Super. Ct. Butts County June 26, 1995). On June 27, the Supreme Court of Georgia denied



Lonchar's application for a certificate of probable cause to appeal the dismissal. *Lonchar v. Thomas*, Nos. 895K1545, 895M1512 (Ga. June 27, 1995).

Lonchar's execution was rescheduled for 3:00 P.M. June 28, 1995. On June 27, Lonchar filed in his own name a 28 U.S.C. § 2254 petition in the district court. The State moved to dismiss the petition. The district court first temporarily stayed the execution to consider the State's motion; later on June 28 the court entered an indefinite stay to reach the merits of the petition. *Lonchar v. Thomas*, No. 1:95-CV-1656-JTC (M.D. Ga. June 28, 1995). In the order granting the stay, the district court found that Lonchar has twice waited until the day of execution—despite having ample time before—to seek relief. The court also found that Lonchar not only neglected to seek relief, but explicitly refused in open court to do so. Finally, based on Lonchar's statement at the hearing on Lonchar's petition, the court found that

[Lonchar's] purpose in asserting the claims is not to obtain a review of the constitutionality and possible errors in his sentence. His sole purpose in asserting the claims is to delay his execution so that the method of execution may be changed to allow him to donate his organs upon death.

(Order at 7.)

The district court concluded that Lonchar's conduct was an abuse of the writ. However, because this § 2254 petition is Lonchar's first, the court felt constrained by this court's precedent to deny the State's motion to dismiss for abuse of the writ. The court therefore denied the motion and granted a stay of execution. The State now moves this court to vacate that stay.

## II. Discussion

The writ of habeas corpus is governed by equitable principles, and the petitioner's conduct may thus disentitle

him to relief. *Sanders v. United States*, 373 U.S. 1, 17, 83 S. Ct. 1068, 1078 (1963); *Gunn v. Newsome*, 881 F.2d 949, 954 (11th Cir. 1989) (en banc). Even when the petitioner follows procedural rules, the writ comes at a cost to finality and state sovereignty. *McCleskey v. Zant*, 499 U.S. 467, 496, 111 S. Ct. 1454, 1469-70 (1991). A petitioner's willful delay and manipulation of the judicial system exacerbate this cost. Thus,

[e]quity must take into consideration the State's strong interest in proceeding with its judgment and [the petitioner's] obvious attempt at manipulation. . . . A court may consider the last-minute nature of an applicant's stay execution in deciding whether to grant equitable relief.

*Gomez v. United States Dist. Court*, — U.S. —, 112 S. Ct. 1652, 1653 (1992). This is the case even apart from the subsequent-petition doctrine of abuse of the writ embodied in Rule 9 of the Rules Governing Section 2254 Petitions and addressed by *McCleskey*. The *Gomez* court made this clear: "Even if we were to assume . . . that [the petitioner] could avoid the application of *McCleskey* to bar his claim, we would not consider it on the merits. Whether his claim is framed as a habeas petition or § 1983 action, Harris seeks an equitable remedy." *Id.* at 1653. The equitable remedy of habeas therefore carries with it equitable doctrines, including the possibility that a petitioner's egregiously abusive conduct can bar relief even if it is the first time he seeks such relief.

The district court acknowledged these principles, but it believed that *Davis v. Dugger*, 829 F.2d 1513 (11th Cir. 1987), controlled the result in this case. We disagree. Even assuming that *Davis* remains good law after *Gomez*, it does not govern this case. In *Davis*, the State contended that the filing of a petition on the eve of execution by itself constituted an abuse of the writ. This court held "only that the fact that a scheduled execution is imminent does not itself create a basis for dismissing the

petition as an abuse of the writ." *Id.* at 1521. The court based its holding exclusively on Rule 9 of the Rules Governing Section 2254 Cases; the court did not consider whether equitable doctrines independent of Rule 9 permit a court to refuse to tolerate egregious abuse.<sup>2</sup>

Based on the principles of equity and the caselaw cited above, we view this case as one in which Lonchar has abused the writ. We need not be detained, however, by a debate over whether this case is properly characterized as one involving an abuse of the writ or simply a case involving abusive conduct and misuse of the writ. However the case is characterized, the district court findings show that Lonchar does not merit equitable relief. First, Lonchar has offered no good reason for his six-year refusal to pursue and exhaust his state collateral remedies and file a federal petition. Second, Lonchar presents no good excuse for his manipulative practice of consistently waiting until his day of execution to seek relief. Finally, Lonchar does not explain why this court should entertain a habeas petition that is explicitly brought to delay his execution, not to vindicate his constitutional rights. As was the case in *Gomez*, "abusive delay . . . has been compounded by last-minute attempts to manipulate the judicial process." *Id.*

### III. Conclusion

The district court granted a stay of execution based on the erroneous conclusion that it could not dismiss the petition for Lonchar's abusive conduct. Because its granting

<sup>2</sup> Davis in fact presented no case of egregious abuse. Although over a year passed between the U.S. Supreme Court's denial of certiorari on the direct appeal and Davis's first state collateral attack and § 2254 petition, this one-year delay was well within Florida's statute of limitations on state collateral relief. *Davis*, 829 F.3d at 1520 n.18. Furthermore, Davis had not been totally inactive; he had petitioned the state for clemency. *Id.* at 1520. The last-minute filing in Davis appeared to result more from Florida's conduct in scheduling an execution before Davis had an opportunity to seek collateral relief than from Davis's willful refusal to seek relief, as is the case here.

of the stay was thus based on an erroneous determination of law, it was necessarily an abuse of discretion. *Jones v. International Riding Helmets, Ltd.*, 49 F.3d 692, 694 (11th Cir. 1995). We accordingly VACATE the stay of execution.

Our mandate shall issue at 5:00 P.M. Eastern Daylight Time today.

STAY VACATED.



SUPREME COURT OF THE UNITED STATES

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95-5015

LONCHAR, LARRY G.

v.

THOMAS, Warden

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Thursday, June 29, 1995

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**CERTIORARI GRANTED**  
**THURSDAY, JUNE 29, 1995**

The application for stay of execution of sentence of death, presented to Justice Kennedy and by him referred to the Court, is granted. The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted.

The Chief Justice and Justice Scalia would deny the application for stay and the petition for a writ of certiorari.

(10)  
No. 95-5015

Supreme Court, U.S.

FILED

AUG 29 1995

CLERK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1995

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LARRY GRANT LONCHAR,  
*Petitioner,*

v.

A. G. THOMAS, WARDEN,  
GEORGIA DIAGNOSTIC & CLASSIFICATION CENTER,  
*Respondent.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

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**BRIEF FOR PETITIONER**

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## QUESTIONS PRESENTED

I. Whether the Eleventh Circuit properly invoked a free-form notion of "abuse of the writ" to dismiss a condemned prisoner's first federal habeas petition on the grounds that the prisoner failed to provide a good reason for not filing sooner, filed shortly before his scheduled execution, and filed for improper subjective personal motives, notwithstanding that the petition concededly raised substantial claims of denial of federal rights, and that the petitioner had previously received repeated explicit assurances from state and federal courts that he could adjudicate his federal claims "at any time" up until his execution.

II. Whether the Eleventh Circuit properly applied its new standard for dismissal of first habeas petitions to petitioner notwithstanding that he lacked any advance notice of the substantial change in the law brought about by the new standard.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1995

No. 95-5015

LARRY GRANT LONCHAR,  
 Petitioner,

v.

A. G. THOMAS, WARDEN,  
 GEORGIA DIAGNOSTIC & CLASSIFICATION CENTER,  
 Respondent.

On Writ of Certiorari to the  
 United States Court of Appeals  
 for the Eleventh Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 58 F.3d 590 (11th Cir. 1995), and is reprinted in the joint appendix ("J.A.") at 545. The opinion of the United States District Court for the Northern District of Georgia is unreported, and is reprinted in the joint appendix at 53.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on June 28, 1995. This Court entered a stay of execution and granted certiorari on June 29, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



## STATUTES INVOLVED

### 28 U.S.C. § 2244(b)

When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a Justice or judge of the United States release from custody or other remedy on an application for writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

### 28 U.S.C. § 2254(a):

The Supreme Court, a Justice thereof, a circuit judge, or a district court, shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Rule 9 of the Rules Governing Cases Under Section 2254:

(a) **Delayed Petitions.** A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of due diligence before the circumstances prejudicial to the state occurred.

(b) **Successive Petitions.** A second or successive petition may be dismissed if the judge finds that it

fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petition constituted an abuse of the writ.

## STATEMENT OF THE CASE

In this case, a federal court refused to permit consideration of a condemned prisoner's first petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254. The court did not do so because of any infirmity in the substance of claims presented. Indeed, it is conceded by all that the petition presents substantial claims for relief. Rather, the court acted for reasons peculiar to the tortured procedural history of this case—principally that petitioner Lonchar failed to take advantage of opportunities to present his federal claims sooner in the context of putative next-friend proceedings filed in his behalf, waited until his execution date was near before filing, and had improper subjective personal motives for seeking relief. Invoking a free-form notion of "abuse of the writ," the Eleventh Circuit held that a district court was free to dismiss a first petition summarily on these grounds. As we will show, however, the court's ruling lacked any foundation in law or in equity. To the contrary, in this case Lonchar did no more than what both state and federal courts repeatedly assured him he could do: file a first habeas petition in his own behalf "at any time" before his scheduled execution. Thus, however understandable the frustration of the Eleventh Circuit at the course of events in this case, it was simply wrong to dismiss Lonchar's petition.

### A. The Trial and Direct Appeal

In 1986, Larry Grant Lonchar was arrested along with a codefendant and charged with three counts of murder and one count of aggravated assault. Following trial by a jury in the Superior Court of DeKalb County, Georgia, before Judge Robert J. Castellani, Lonchar was found

guilty on June 27, 1987, and sentenced to death by electrocution.

Throughout the proceedings, Lonchar displayed a powerful suicidal impulse—an impulse consistent with the serious mental illness he had struggled with throughout his life.<sup>1</sup> Upon arrest in Texas, Lonchar ran toward the arresting officer, yelling “shoot me, shoot me.”<sup>2</sup> Shortly after his arrest, Lonchar told an interrogating officer “it was pointless to tell anyone about [the crime], that he just wanted to get it [the trial] over with and die.”<sup>3</sup> He repeatedly told the same detective, and his former parole officer,<sup>4</sup> about a cemetery plot that he had asked his family to purchase. Records from the DeKalb County Jail, where Lonchar was held pending trial, show him under constant suicide watch due to extreme depression.<sup>5</sup>

<sup>1</sup> Records of Lonchar’s previous incarcerations, and records from psychological examinations conducted after he was sentenced to death, show a consistent pattern of serious depression and suicidal impulses. See 5/28/76 Psychological Screening Report in Petitioner’s Appendix to Petition for Writ of Habeas Corpus at Section E, *Kellogg v. Zant*, No. 90-V-2735 (Butts Co. Sup. Ct., March 28, 1990).

<sup>2</sup> Oral Statement of Defendant at Time of Arrest on 10/20/86, in Record on Appeal at 205 (Ga. 1987).

<sup>3</sup> J.A. 540, 541.

<sup>4</sup> Lonchar’s former parole officer, Amber Watson, who had told Lonchar to seek psychological help just before the crime, detailed Lonchar’s serious depression. Summary of Conversations Between Amber Watson and Larry Lonchar Subsequent to His Arrest, in Record on Appeal at 206 (6/5/87).

<sup>5</sup> See Petitioner’s Appendix to Petition for Writ of Habeas Corpus at Section F, *Kellogg v. Zant*, No. 90-V-2735 (Butts Co. Sup. Ct., March 28, 1990). Shortly after Petitioner was arrested, the jail health personnel met with him and made the following observation: “He says he has never been happy and now he is going to die in the electric chair and maybe he will be happy in another life. He says his family has already retained a grave site

According to prison mental health records, Lonchar did “not want to live. Sees no future for himself and does not even want his lawyer to defend him.”<sup>6</sup> At one point the records indicated he was a “high suicide risk.”<sup>7</sup> After being sentenced to death, the doctors noted that Lonchar “appears ‘pleased.’ ‘I got what I wanted.’ He says he has no intention to kill himself now because they will do it for him.”<sup>8</sup>

Consistent with the self-destructive impulses and sense of helplessness that characterize serious depression, Lonchar refused to cooperate with his attorney in preparing his defense. As Lonchar told the court, “[a]s far as being present and assisting Mr. Leipold I haven’t assisted Mr. Leipold since he has taken this case. I have told him things, I have never told him the truth . . . I have never told him what happened, so, how can he assist me.”<sup>9</sup> At an *in camera* hearing, Lonchar’s lawyer told the trial judge that Lonchar was refusing to cooperate, and that he could obtain relevant information only through the district attorney.<sup>10</sup> After these comments, the attorney stated: “We have some serious problems right here now with what has just been said. I mean, I don’t even know what to go forward with now.”<sup>11</sup> Thus, Lonchar’s trial counsel was effectively precluded from putting on a defense even though Lonchar did not confess to the crimes, there was no eyewitness testimony that Lonchar killed

in Michigan for him at his request.” Doctor’s Progress Notes, 11/3/86.

<sup>6</sup> Doctor’s Progress Notes of 5/20/87, Kellogg Petition for Habeas Corpus, Appendix F.

<sup>7</sup> Doctors Progress Notes, 12/11/86.

<sup>8</sup> Doctor’s Progress Notes of 6/29/87.

<sup>9</sup> Trial Tr. at 61 (J.A. 400).

<sup>10</sup> 1987 *In Camera* hearing at 2-3 (J.A. 392).

<sup>11</sup> Trial Tr. at 61 (J.A. 400).



any of the victims, there was strong circumstantial evidence that Lonchar's codefendant had committed the murders, and the codefendant indisputably committed the aggravated assault.

Perhaps the most striking manifestation of Lonchar's instinct for self-destruction was his insistence that he not be present during trial. Lonchar told the court that "[m]y presence [at trial] is irrelevant. . . . I know what is going to happen in this case and, you know, there is nothing I can do about it."<sup>12</sup> After arguing with Lonchar about whether the trial was a "foregone conclusion," the judge told him, "I am sorry you feel that way. But all I can do is advise you as to what your rights are and advice [sic] you what your alternatives are."<sup>13</sup> After this colloquy, the judge permitted the trial to go forward with Lonchar absent. Lonchar did not testify, and appeared before the jury only briefly for identification purposes.<sup>14</sup> At the sentencing proceeding, however, Judge Castellani reversed course, countermanning Lonchar's insistence that his attorney not put on a case in mitigation.<sup>15</sup>

Notwithstanding counsel's extreme handicaps in mounting any defense on Lonchar's behalf, the jury struggled with the decision whether to impose death. Counsel for the defense asked for an instruction that he would serve 30 years if not given the death penalty. The prosecution stipulated that the instruction was legally accurate, but objected on the ground that Georgia law precluded any mention of parole at sentencing. The trial court declined to give the instruction. Despite the absence of an instruction, the jury, after a lengthy deliberation, requested an

<sup>12</sup> Trial Tr. at 64-65 (J.A. 402).

<sup>13</sup> Trial Tr. at 66 (J.A. 403).

<sup>14</sup> These facts would appear to create a clear entitlement to relief in the Eleventh Circuit. See *Hall v. Wainwright*, 733 F.2d 766, 775 (11th Cir. 1984).

<sup>15</sup> Trial Tr. at 1341-44 (J.A. 414-18).

instruction on how long Lonchar would serve were he given a life sentence. The trial court refused to answer the question. After further deliberation, the jury returned a death sentence.<sup>16</sup>

Following the denial of a motion for a new trial, Lonchar's attorney appealed to the Georgia Supreme Court on December 4, 1987. Lonchar objected, but the court rejected his position on the ground that appellate review was mandatory under Georgia law.<sup>17</sup> The Georgia Supreme Court affirmed on July 13, 1988, *Lonchar v. State*, 258 Ga. 447, 369 S.E.2d 749 (1988). Lonchar then departed from his self-destructive course and authorized the filing of a petition for certiorari, which was denied. *Lonchar v. Georgia*, 488 U.S. 1019 (1989).

#### B. The 1990 Kellogg Next Friend Petition

In early March 1990, the Superior Court of DeKalb County (per Judge Castellani) issued a warrant authorizing Lonchar's execution during the period March 23 to March 30.<sup>18</sup> Lonchar's sister, Chris Kellogg, filed a next-

<sup>16</sup> Trial Tr. at 1332, 1337-38, 1361, 1457-58, 1465.

These facts would appear to give rise to a clear Eighth Amendment violation. See *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994). Additionally, they form the basis for a claim of ineffective assistance of appellate counsel in this case. See generally *Evitts v. Lucey*, 469 U.S. 387 (1985). Despite having been alerted to the existence of this claim, appellate counsel on direct review inexplicably failed to include it. See Petition for Writ of Habeas Corpus, *Lonchar v. Thomas*, No. 1:95-CV-1656-JTC (N.D. Ga., June 26, 1995).

<sup>17</sup> The defense attorney, prosecutors and the trial judge all agreed that Georgia's mandatory appeal process for capital cases overrode Lonchar's wishes. Hearing on Motion for A New Trial, 3, 7 (11/2/87) (J.A. 418-21).

<sup>18</sup> Lonchar had sent the trial court a series of letters asking to be put to death, as the Georgia Supreme Court noted. *Kellogg v. Zant*, 260 Ga. 182 n.1, 390 S.E.2d 839 n.1 (1990) (commenting that immediately after this Court's denial of certiorari on direct appeal, Mr. Lonchar petitioned the trial court to "sign the death warrant").

friend petition for habeas corpus in state court on March 21, 1990. The petition detailed Lonchar's history of serious mental illness, presented new psychological evaluations, and set forth 16 claims for relief—most of which focused on the risk that Lonchar had not received a fair trial and sentencing as a result of his mental illness.<sup>19</sup>

The court held a hearing in March, 1990. Although Lonchar declined to proceed at the time, the judge told him during the hearing that "if you change your mind, you still have at least, for the time being an option to proceed." (J.A. 427). Later, approximately 24 hours before the scheduled execution, the court cautioned Lonchar that "I wouldn't wait until I was ready to sit in that chair and make that decision because at that point it may be too late."<sup>20</sup> But the court was equally clear even then that, although the next friend petition had to be dismissed based on the court's finding that Lonchar was competent, Lonchar could still choose to initiate his own habeas petition: "[Lonchar] certainly has the ability to in effect stop [the execution] for the time being. The stay would in all likelihood have to be entered because there are claims in the petition or any petition that he could file that would require an evidentiary hearing. There is obvious not enough time and a stay would have to be entered."<sup>21</sup>

On March 28th, the court issued an order finding Lonchar competent and dismissing the next-friend petition

<sup>19</sup> The key claims focused on the trial court's failure to conduct a competency hearing (Claim I); the impermissibility of trying an incompetent person (Claim II); the insufficiency of the trial court's inquiry into Lonchar's ability to be absent from most of the trial (Claim III); and the failure of Lonchar's attorney to adequately investigate Petitioner's mental illness (Claim IV).

<sup>20</sup> 3/28/90 Hearing at 373 (J.A. 433).

<sup>21</sup> (3/28/90 hearing at 374, J.A. 434). Recognizing Lonchar's continuing right to file an appeal, the judge granted an access order to Lonchar's attorney in case Lonchar changed his mind. 3/28/90 hearing at 378-79, 381 (J.A. 439).

for lack of standing. *Kellogg v. Zant*, No. 90-V-2735 (J.A. 2). The Georgia Supreme Court affirmed. *Kellogg v. Zant*, 260 Ga. 184, 390 S.E.2d 841, cert. denied, 498 U.S. 890 (1990).

On October 23, 1990, Chris Kellogg filed a next-friend habeas petition in federal court, presenting the same claims presented in her state petition.<sup>22</sup> On August 13, 1991, the court (per Judge Camp) ordered an evidentiary hearing to determine Lonchar's competence (and thus Kellogg's standing).<sup>23</sup> The court declined to afford a presumption of correctness to the state court finding that Lonchar was competent, on the ground that the state court had failed to afford Kellogg a "full and fair" hearing on that issue. In that regard, the court noted that one state's expert had testified about Lonchar's mental state without ever having evaluated him.<sup>24</sup>

The federal evidentiary hearing was held on November 12-14, 1991. The court received testimony from three psychiatrists who, based on recent examinations, all con-

<sup>22</sup> The District Court (per Judge Camp) could not assume jurisdiction until June 1991, when the state proceedings were finally concluded. See *Kellogg v. Zant*, No. 1:90-CV-2336-JTC (N.D.Ga. Apr. 18, 1991) (order directing parties to notify the court when state habeas proceedings were final so that District Court could assume jurisdiction).

<sup>23</sup> *Kellogg v. Zant*, No. 1:90-CV-2336-JTC (N.D.Ga. Aug. 18, 1991) (order deferring Respondent's motion to dismiss) (hereinafter "Order of 8/13").

<sup>24</sup> *Order of 8/13* at 12 ("[i]n the rush to execute Mr. Lonchar, the state court compromised the adequacy of the competency hearing"). Judge Camp concluded that the state court exacerbated time constraints by failing to give Ms. Kellogg adequate notice of the hearing, compromised her ability to call witnesses and rebut the state's evidence, and unfairly excluded evidence when its improper form was due to time constraints. *Order of 8/13* at 8-11. The court also noted that "[a]n unfortunate collateral consequence of the State's unwillingness to delay the original execution date by a few days [was] a substantial increase in the length of these proceedings." *Id.* (J.A. 18).



cluded that Lonchar suffered from serious depression. One expert concluded that Lonchar suffered from bipolar disorder (i.e. he was manic depressive), and that this condition disabled him from deciding rationally whether to pursue his constitutional claims. The other two concluded that Lonchar, though suffering from serious depression, was not manic-depressive, and could make a rational decision whether to proceed.<sup>25</sup>

Judge Camp also examined Lonchar directly. The judge inquired into Lonchar's professed desire to forgo postconviction relief, and into Lonchar's understanding of the consequences of not filing a habeas petition.<sup>26</sup> He specifically asked Lonchar whether he understood that at "*any time you can change your mind up until the time your, of course, sentence is executed, and bring a petition for habeas corpus?*"<sup>27</sup> Immediately after Judge Camp made that statement, the following colloquy occurred:

Q: Now, if I understand the law correctly . . . a habeas corpus proceeding in federal court, *although if you abandon this proceeding you have to bring one in the future*, but if you choose not to bring a habeas corpus proceeding in federal court, that is the last available means of relief that would be available to you from your sentence. Is my perception in that regard correct, counsel, based on the record in this case?

[Both attorneys answer in the affirmative]

Q: Do you understand that, Mr. Lonchar?

A: Yes.<sup>28</sup>

On February 18, 1992, the district court entered an order finding Lonchar competent and dismissing the next-

<sup>25</sup> Evidentiary Hearing, *Kellogg v. Zant*, No. 1-90-CV-2336-JTC (N.D. Ga.), Nov. 12-14, 1986.

<sup>26</sup> Nov. 1991 Tr. at 437-439 (J.A. 442-45).

<sup>27</sup> Nov. 1991 Tr. at 443 (emphasis added) (J.A. 447).

<sup>28</sup> Nov. 1991 Tr. at 444 (emphasis added) (J.A. 447).

friend petition for lack of standing.<sup>29</sup> Despite Judge Camp's assurance that Lonchar could bring a habeas petition at any time in the future, the order made reference to a "waiver" by Lonchar of further appeals. But the order also stated that the sole issue before the court was Kellogg's standing, which depended on whether was found competent.<sup>30</sup> On March 12th, the court granted a certificate of probable cause to appeal.

On November 13, 1992, the Eleventh Circuit affirmed. *Lonchar v. Zant*, 978 F.2d 637, 642 (11th Cir. 1992). The court held that because Kellogg could not prove Lonchar was "unable to litigate his own cause," *id.* at 643, she failed to establish standing. Certiorari was denied on February 24, 1993. *Lonchar v. Zant*, 113 S.Ct. 1378 (1993).

### C. Lonchar's 1993 State Habeas Proceedings

In early February 1993, while the petition for certiorari was pending, the DeKalb County Superior Court (per Judge Castellani) issued a warrant authorizing Lonchar's execution during the period February 24 to March 2. The execution was scheduled for February 24th. On that date, Judge Castellani, who had presided over Lonchar's trial and sentencing and issued the death warrant, visited Lonchar in the penitentiary and met with him privately.<sup>31</sup> One of Lonchar's lawyers also informed Lonchar by telephone that his brother had threatened to commit suicide if Lonchar did not seek to stop the scheduled execution.

<sup>29</sup> Although he accepted the psychiatrists' unanimous opinion that Lonchar had a mental illness, p. 9, 11, Judge Camp found that the standard established in *Rees v. Peyton*, 384 U.S. 312, 314 (1966), was not met. (J.A. 20, 30).

<sup>30</sup> Slip op. at 7 (citing *Whitmore v. Arkansas*, 495 U.S. 149 (1990) (J.A. 24)).

<sup>31</sup> Motion to Disqualify Judge, filed in *State v. Lonchar*, No. 86-CR-3747 (June 13, 1995), and affidavit of Stephen Bayliss attached thereto. (J.A. 164).

Shortly after these conversations, Lonchar agreed to allow a state habeas petition to be filed in his own behalf. The petition was filed, and the execution was stayed.

On April 6, 1993, the case was assigned to Judge Cook-Connelly. In July 1993, Lonchar indicated that he wished to dismiss the petition. The court set a hearing for October 29, 1993 to ascertain Lonchar's intentions. Because of a serious injury to Lonchar's attorney, the court continued the hearing indefinitely.<sup>32</sup> The hearing was eventually set for April 19, 1994, but rescheduled again on the court's initiative. On June 23rd, the hearing was held. Lonchar's counsel objected to the court's inquiry into Lonchar's desires, claiming that there was sufficient evidence to doubt his competency.<sup>33</sup> The court rejected this argument, and asked Lonchar to testify as to his intentions with respect to the petition. Lonchar testified that he no longer wanted to pursue the petition. The court dismissed the petition, reserving the issue whether the dismissal was with prejudice.<sup>34</sup> On July 1, 1994, Lonchar's counsel submitted a brief opposing dismissal with prejudice.<sup>35</sup> Shortly thereafter the state chose to concede that dismissal without prejudice would be appropriate, and submitted a proposed order to that effect.<sup>36</sup> Six months later (and less than six months before the proceedings now at issue), in January 1995, the court

<sup>32</sup> See Prehearing Brief on Behalf of Respondent at 8-9 (Super. Ct. Butts County June 20, 1994).

<sup>33</sup> See Transcript of Proceedings Heard Before Honorable Kristina Cook Connelly at 9-10 (Butts Co. Sup. Ct., June 23, 1994) (J.A. 451).

<sup>34</sup> See *id.* at 36 (J.A. 470).

<sup>35</sup> See Brief in Opposition to Dismissal With Prejudice (Butts Co. Sup. Ct., July 1, 1994). (J.A. 161).

<sup>36</sup> See Response to Counsel's Brief in Opposition to Dismissal With Prejudice at 2 (Butts Co. Sup. Ct., July 6, 1994), at 3 (J.A. 161).

entered an order dismissing Lonchar's petition without prejudice.<sup>37</sup>

On February 13, 1995, Lonchar's attorneys sought reconsideration of the dismissal, on the grounds of Lonchar's incompetence.<sup>38</sup> The motion was denied on February 23, 1995. (J.A. 33). The Supreme Court of Georgia denied a certificate of probable cause to appeal on April 4th, and denied rehearing and remanded the case on May 4th.

#### D. The 1995 Milan Lonchar Next-Friend Petition

On June 8, 1995, the DeKalb County Court (per Judge Castellani) issued an execution warrant authorizing Lonchar's execution during the period June 23 through June 30. On June 20th, Milan Lonchar, petitioner's brother, filed a next friend habeas corpus petition in Butts County Superior Court. The petition was accompanied by affidavits from two psychologists who testified that Lonchar's bizarre behavior, a 1993 suicide attempt in prison, his vacillation as to whether he wanted to live or die, and his confessions that he lied to experts during prior evaluations in order to mask the extent of his mental illness, necessitated a new competency evaluation.<sup>39</sup> Dr. Davis, one of the state's own experts in the

<sup>37</sup> See Order of Dismissal, Jan. 16, 1995 (J.A. 34).

<sup>38</sup> In support of their motion for reconsideration, the attorneys pointed out that the last competency evaluation of Lonchar had taken place more than three years earlier, and thus the judge's failure to conduct a new evidentiary hearing and to accept *ex parte* presentation of recent information regarding Lonchar's competency required reconsideration before Lonchar could be executed. Petitioner's Motion to Reconsider Dismissal of Petition for Writ of Habeas Corpus, Denial of An Evidentiary Hearing on Competency and Voluntariness Issues, and Refusal to Permit *Ex Parte* Presentation of Privileged Information Indicating Incompetency and Involuntariness, *Lonchar v. Zant*, No. 93-V-99 (Butts Co. Sup. Ct., Jan. 1, 1995).

<sup>39</sup> Dr. Herendeen, who had been treating Lonchar informally, submitted an affidavit containing the following conclusions:

¶ 7 ("Based on the sum of my experience with Mr. Lonchar and my review of the materials concerning his case, it is



1991 competency hearing in *Kellogg v. Zant*, submitted an affidavit concluding that his prior finding that Lonchar was competent was no longer reliable due to Lonchar's unpredictable and irrational actions.<sup>40</sup>

Milan Lonchar also sought an order permitting a psychological evaluation. Attached to this motion was a sworn statement dated June 9, 1995, by Larry Lonchar expressing his consent to be given a formal psychological evaluation.<sup>41</sup> At oral argument, however, Lonchar stated that he wished not to be examined, and declared his op-

my opinion . . . that Mr. Lonchar is currently incompetent to waive his habeas corpus appeals, and that his decision is a voluntary one.").

¶ 10 ("The most obviously significant event since Mr. Lonchar's last evaluation occurred in February 1993, when he signed papers just thirty minutes before the time scheduled for his execution, authorizing his attorneys to seek a stay of execution and pursue a habeas petition on his behalf").

¶ 12 ("In May 1993, Mr. Lonchar attempted suicide by slashing his wrist with a sharp object. When prison officers blocked the suicide attempt, Mr. Lonchar's depression deepened. The psychological processes which led to Mr. Lonchar taking this drastic and irrational action must be thoroughly evaluated, and a professional assessment of Mr. Lonchar's current mental capacity must consider this event.").

¶ 14 ("Mr. Lonchar has concealed his history of manic episodes from those evaluators [in 1991], which deprived them of the information essential to a proper diagnosis. Mr. Lonchar has said that he lied to the state experts when they asked him whether he had ever had manic phases, and that he couldn't believe they did not evaluate him in a context and environment in which his manic episodes would have been revealed to them. As a result, the conclusion of the state evaluators that bipolar disorder could be ruled out . . . can no longer be credited").

(J.A. 273-78)

<sup>40</sup> See *id.* Ex. C (J.A. 281).

<sup>41</sup> See Mot. for Order Permitting Psychological Evaluation Ex. A (Butts Co. Sup. Ct., June 20, 1995) (J.A. 285, 295).

position to the next friend petition.<sup>42</sup> Relying on Larry Lonchar's mercurial self-assessment (which was unsworn), and a 1991 competency finding (which rested on an expert opinion that was no longer reliable according to the sworn statement of the state expert who rendered it), the court found Lonchar competent, and dismissed Milan Lonchar's petition for lack of standing. *Lonchar v. Thomas*, No. 95-V-238 (Butts Co. Sup. Ct. June 21, 1995) (J.A. 35). The Georgia Supreme Court denied a certificate of probable cause. *Lonchar v. Thomas*, No. S95H1500 (Ga. June 22, 1995) (J.A. 37).

On June 22, 1995, Milan Lonchar filed a next-friend habeas petition in federal court. Without an evidentiary hearing, the district court (per Judge Camp) summarily rejected Milan Lonchar's request for a formal psychological evaluation of Lonchar's competency, and dismissed the next-friend petition for lack of standing. *Lonchar v. Thomas*, No. 1:95-CV-1600-JTC (N.D. Ga. June 22, 1995). The Eleventh Circuit denied a certificate of probable cause to appeal. *Lonchar v. Thomas*, 58 F.3d 588 (11th Cir. June 23, 1995).

#### E. Lonchar's 1995 State Habeas Proceedings

On June 23rd, Larry Lonchar filed a petition for habeas corpus relief in his own behalf in the Superior Court of Butts County. The State moved to dismiss. A hearing was held on the 23rd. Lonchar was placed under oath, and asked by the court whether he sought to pursue the claims for relief contained in the petition. He answered that he did wish to pursue the claims, and that he was doing so in order to give the legislature time to change the method of execution so that Lonchar could donate his organs should he be put to death. The court then sought to have Lonchar verify that he wished to

<sup>42</sup> Hearing Transcript, Milan Lonchar v. Thomas, No. 95-V-328 (Butts Co. Sup. Ct. June 21, 1995), at 3, 12, 15-17, 25, 30 (J.A. 483).

pursue each of the individual claims set forth in the petition. Lonchar affirmed his intent to pursue each specific claim set forth in the petition. (J.A. 492-96). The court also inquired into whether Lonchar had "waived" his federal claims. Counsel for the state responded that, based on a review of the record of the prior proceedings, "no specific waiver on the record in any particular proceeding" was found.<sup>43</sup>

On June 25th, the court issued an order dismissing the petition. Notwithstanding Lonchar's testimony that he did wish to pursue all of the claims set forth in the petition, the court held on the basis of "demeanor" evidence that Lonchar did not genuinely intend to pursue most of his claims for relief. Shortly after the order was issued, Lonchar filed a motion for reconsideration, which included a verification by him emphatically repeating his desire to pursue all claims for relief. (J.A. 370, 373).

#### F. The Federal Habeas Proceedings

On June 26, 1995, Lonchar filed the federal habeas petition presently at issue. The state moved to dismiss on June 27th. The state argued that Lonchar's petition should be denied because Lonchar had the opportunity to bring his federal constitutional claims earlier, but had, in effect, abandoned them by failing to adopt the pleading ostensibly filed in his behalf in the next friend proceedings. The state also argued that Lonchar had waived his federal claims, and that some of the claims were procedurally defaulted. The state reserved the option to invoke laches under Habeas Rule 9(a), but admitted it did "not have the information to make the showing of prejudice" at that time.<sup>44</sup>

In a supplemental brief filed in support of the motion, the state argued that *McCleskey v. Zant*, 499 U.S. 467

<sup>43</sup> June 23 Hearing Tr. at 21 (J.A. 499).

<sup>44</sup> Motion to Dismiss, at 24 (J.A. 387).

(1991), controlled. The state argued for dismissal based on "objective factors, including the facts that petitioner has refused to participate in two separate [next friend] federal habeas corpus petitions, for whatever reasons, and that nothing has been presented in this court which could not have been raised in the earlier proceedings." The state argued that "Mr. Lonchar's motivation is not the controlling factor" in this inquiry, but that his conduct was "abusive" because "he was aware of his rights, had discussed the issues with counsel and could have raised these claims at the time the next friend petitions were filed."<sup>45</sup>

The district court (per Judge Camp) entered a temporary stay of execution on June 28th. The court noted that "[n]ormally a prisoner is entitled to federal review of the conviction and sentence for errors of constitutional magnitude," and that Lonchar's petition "presents significant issues concerning the validity of Petitioner's trial and sentence" which had never been reviewed in a federal proceeding. The court also noted the State's argument that Lonchar "may have waived the right to review." Because "the issue of waiver require[d] further consideration," the Court granted the stay and convened an evidentiary hearing.<sup>46</sup>

At the hearing, the following colloquy occurred between Judge Camp and Lonchar:

Q Now, I understand your point with regard to the manner of execution so that you can donate your organs, that's the point you were making to me a moment ago; is that correct?

A. That's correct.

Q Now, a great deal of the petition goes far beyond that, and alleges irregularities and violations of

<sup>45</sup> Supplemental Brief In Support of Motion To Dismiss, at 4-5 (J.A. 390).

<sup>46</sup> Order, *Lonchar v. Thomas*, No. 1:95-CV-1656-JTC (N.D. Ga. June 28, 1995) (J.A. 63).



your rights that would affect both your sentence and conviction and your sentence of execution in a prior state court proceeding. Is it your wish to pursue those claims through a petition for Federal Habeas Corpus relief? Do you understand my question?

A Yes, your honor. Personally, I have to agree that I have to pursue this position to follow on what I would like to do, so I would have to say to the Court that, yes, I do.<sup>47</sup>

Shortly after the hearing, the court entered an order denying the motion to dismiss and refusing to vacate the stay. In that order, Judge Camp found that "Lonchar is familiar with and wishes to assert the claims in his present habeas petition; however, his purpose in asserting the claims is not to obtain a review of the constitutionality and possible errors in his sentence." Rather, the court found, Lonchar's purpose was "to delay his execution so the method of execution may be changed to allow him to donate his organs upon his death." (J.A. 58). The court also found that during the federal "next friend" proceeding in 1991, *Kellogg v. Zant*, Lonchar had knowingly and intelligently "waived" further review of his sentence, and that Lonchar offered no reason for failing to pursue habeas relief in that earlier proceeding. The court made no finding that the State suffered prejudice as a result of this conduct.

The court believed Lonchar's conduct would have constituted an "abuse of the writ" under Rule 9(b) of the Rules Governing Section 2254 Cases, had that provision applied. Because the abuse of the writ of doctrine applied only to successive habeas petitions, however, the court held that it could not properly dismiss Lonchar's first petition as an abuse of the writ. (J.A. 61). The Court also held that no common law authority authorized dismissal of Lonchar's petition. (J.A. 62).

<sup>47</sup> Evidentiary Hearing, *Lonchar v. Thomas*, No. 1:95-CV-1656-JTC (N.D. Ga.), at 18-19 (J.A. 513).

On June 28th, the state filed a motion in the Eleventh Circuit to vacate the stay. The motion stated that "the Rules Governing Section 2254 Cases were not the basis for" dismissing Lonchar's petition. In particular, the state admitted it had not "shown particularized prejudice" under Habeas Rule 9(a), and that it had "not relied on Rule 9(b)," which covers abuse of the writ.<sup>48</sup>

The Eleventh Circuit granted the motion. The court acknowledged Eleventh Circuit precedent that a first federal habeas petition could not be dismissed on the ground that it was filed on the eve of execution.<sup>49</sup> The Eleventh Circuit also took note of this Court's per curiam opinion in *Gomez v. United States Dist. Ct.*, 503 U.S. 653 (1992), which the court read as announcing the principle that a petitioner's abusive conduct "can bar relief even if it is the first time he seeks such relief." Remark- ing that it "need not be detained, . . . by a debate over whether this case is properly characterized as one involving abuse of the writ or simply a case involving abusive conduct and misuse of the writ," the court held that the district court's stay should be vacated because Lonchar had "abused the writ." The court identified the follow- ing considerations as supporting its conclusion: Lonchar failed to explain why he had not filed the petition earlier and had forgone the opportunity to present his claims in the putative next friend proceedings, failed to explain why he had waited until the eve of execution to file the petition, and was pursuing habeas relief for improper reasons.

Lonchar then filed with this Court an application to stay the execution, and simultaneously filed a petition for certiorari. On June 29, 1995, this Court granted the stay of execution and the petition for certiorari. 115 S. Ct. 2640.

<sup>48</sup> Emergency Motion to Vacate Stay of Execution (June 29, 1995) at 4, 11 (J.A. 383-84).

<sup>49</sup> See *Davis v. Dugger*, 829 F.2d 1513, 1518 (11th Cir. 1987).

## SUMMARY OF ARGUMENT

Although this case has followed an extremely unusual and tortured procedural path, its proper resolution is not at all difficult. The free-form "abuse of the writ" analysis applied by the Eleventh Circuit lacks any mooring in the "historical usage, statutory developments, and judicial decisions" that "inform" and "control" a federal court's equitable discretion under 28 U.S.C. § 2254, and should therefore be rejected. See *McCleskey v. Zant*, 499 U.S. 467, 487 (1991). Taken singly or together, the reasons the Eleventh Circuit advanced for its decision do not provide a legitimate (much less a convincing) justification for dismissing Lonchar's petition. Denying Lonchar any consideration of his first habeas petition on the basis of the reasons advanced below would therefore be "contrary to the writ's most basic traditions and purposes." See *O'Neal v. McAnich*, 115 S. Ct. 992, 997 (1995).

First, the ruling below cannot be justified by what the court of appeals described as Lonchar's failure to provide a "good reason for six-year refusal to pursue and exhaust his state collateral remedies and file a federal petition." In Rule 9(a) of the Rules Governing Section 2254 Cases, Congress specifically dictated the circumstances under which a petitioner must justify an alleged delay in the filing of a first habeas petition. As the State conceded below, Rule 9(a) cannot justify dismissal here because the State has not made the showing of prejudice the rule requires. Lonchar was therefore under no obligation to provide a reason for failing to file sooner.

That Lonchar filed his first federal habeas petition shortly before his scheduled execution does not alter this analysis of the significance of the delay in filing the petition. As a general matter, this Court has made clear that a petitioner who makes a substantial showing of a denial of a federal right in a first federal habeas petition should receive a stay of execution to permit consideration of the

petition. See *Barefoot v. Estelle*, 463 U.S. 880, 891-95 (1983); *Collins v. Byrd*, 114 S. Ct. 1288 (1994) (denial of application to vacate stay).<sup>50</sup> Because stays will be requested only after an execution date has been set, the principles set forth in *Barefoot* will typically be applied when an execution date is imminent. Under well-established law, therefore, the imminence of an execution cannot itself establish prejudice sufficient to justify dismissal of a first petition or denial of a stay to permit consideration of a first petition containing a substantial claim of denial of a federal right.

Second, even if the equitable nature of habeas proceedings would permit a departure from those established principles in some cases, no departure is warranted here. To the contrary, the equities cut decisively against dismissal. Throughout the prior proceedings, Lonchar received express assurances from both state and federal courts that he could change his mind and file a habeas petition "at anytime" prior to his execution. And, with respondent's assent, the state court dismissed Lonchar's own habeas petition without prejudice in January 1995, thereby inviting Lonchar to institute new proceedings at a later time. Lonchar's state petition was thus refiled within 6 months of the prior order dismissing it without prejudice; indeed, it was filed within weeks of that state habeas proceeding having become final. In light of these assurances, it would be grossly inequitable—indeed it would be an indefensible sort of entrapment—to hold that Lonchar is disentitled to relief because he did not take advantage of prior options to pursue relief. The

<sup>50</sup> Save for this case, the Eleventh Circuit has consistently respected that principle. See *Davis v. Dugger*, 829 F.2d 1513 (11th Cir. 1987) (Rule 9(a) does not authorize dismissal of first habeas petition on ground that it was filed shortly before execution); *Bundy v. Wainwright*, 808 F.2d 1410, 1420 (11th Cir. 1987) (stay must be entered to permit consideration of first habeas petition filed shortly before execution if it contains substantial claim of denial of federal right).



Eleventh Circuit's "equitable" analysis gives no hint of even considering these facts, which ought to have been decisive in any balancing of the equities.

More generally, to the extent the judiciary was burdened by a series of next-friend proceedings, that was entirely the result of the conduct of persons other than Lonchar, acting in each instance without his authorization. Had the next-friend petitions never been filed, and had Lonchar merely waited silently until after his execution date was set, even the State concedes his petition could not properly have been dismissed under well-established law. The result should be no different merely because others took unauthorized actions purportedly in his behalf.

*Third*, the Eleventh Circuit erred in giving substantial weight to Lonchar's subjective motives for seeking habeas relief. Once the district court established that Lonchar intended to pursue the habeas claims set forth in his petition, inquiry into motive should have ceased. The general rule in civil litigation is that an objectively meritorious claim for relief may not be dismissed because it is being pursued for subjective motives that may be improper. This rule is necessary to insure against unwarranted restrictions on citizens' fundamental right of access to the courts. Considerations of judicial administration also favor the rule because no manageable standards exist to govern inquiry into the intractably murky territory of human motivation. These justifications apply with full force in the habeas context.

## ARGUMENT

### I. LONCHAR'S ALLEGED DELAY IN BRINGING HIS FIRST FEDERAL HABEAS PETITION CANNOT JUSTIFY THE ELEVENTH CIRCUIT'S REFUSAL TO ALLOW CONSIDERATION OF THE MERITS OF THE PETITION

The Eleventh Circuit's ruling rested in substantial part on its conclusion that Lonchar had failed to provide a "good reason" for the "six-year delay" in filing his petition and for waiting until execution was imminent. Effectively, therefore, the Eleventh Circuit required Lonchar to show "cause" for failing to file his petition sooner.

It is well established, however, that the mere fact of delay—even a substantial delay—between a party's conviction and the filing of a habeas corpus petition does not justify dismissing the petition. "[T]here is no statute of limitations governing federal habeas, and the only laches recognized are those which affect the State's ability to defend against the claims raised on habeas." *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1721 (1993) (emphasis added).<sup>51</sup> This principle is embodied in Rule 9(a) of the Rules Governing Section 2254 Cases, which specifically dictates the circumstances under which a first federal habeas petition may be dismissed for reasons of delay.<sup>52</sup>

<sup>51</sup> See *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986); *Heflin v. United States*, 358 U.S. 415, 420 (1959) (Stewart, J., concurring); *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 123 (1956); *Collins v. Byrd*, 114 S. Ct. 1288 (1994); *Dobbs v. Zant*, 113 S. Ct. 823 (1993); *Richmond v. Lewis*, 113 S.Ct. 528, 531-34 (1992). See also *Davis v. Dugger*, 829 F.2d 1513, 1519 (11th Cir. 1987) ("[n]one of our prior decisions upholding Rule 9(a) dismissals ha[s] involved delays of less than 15 years between sentencing and the filing of the federal habeas petition").

<sup>52</sup> Rule 9(a) provides:

A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he

Under this provision, unjustified delay is grounds for dismissal only if the state makes a particularized showing that the delay prejudiced its ability to respond. *Vasquez v. Hillery*, 474 U.S. at 265; *Wise v. Armontrout*, 952 F.2d 221, 223 (8th Cir. 1991); *Smith v. Duckworth*, 910 F.2d 1492, 1496 (7th Cir. 1990); *Strahan v. Blackburn*, 750 F.2d 438, 441, 443 (5th Cir.), *cert. denied*, 471 U.S. 1138 (1985).

Under Rule 9(a), therefore, Lonchar was under no obligation to provide a "good reason for six-year refusal to pursue and exhaust his state collateral remedies and file a federal petition" unless the state first proved the delay prejudiced its ability to litigate the claims in the petition. Conceding it was not able to make the required showing of prejudice, the State specifically declined to invoke Rule 9(a) in the Eleventh Circuit. Requiring Lonchar to provide a "good reason" despite the State's concession, the Eleventh Circuit ignored the plain terms of Rule 9(a). That ruling was particularly inappropriate because the court invoked its equitable powers not to fill gaps in the congressional scheme or otherwise act where Congress was silent, but to transgress a specific limit Congress placed on a court's discretion to dismiss first federal habeas petitions.

Indeed, the Eleventh Circuit applied a legal standard Congress specifically *rejected* when it enacted Rule 9 in 1976. As originally transmitted to Congress pursuant to the Rules Enabling Act, proposed Rule 9(a) would have created a presumption of prejudice habeas petitions filed more than 5 years after a conviction was final.<sup>63</sup> Such a presumption would have shifted to the petitioner the burden of justifying any delay greater than 5 years—a rule virtually equivalent to that applied by the Eleventh Circuit here. After the proposal was subjected to substantial

could not have had knowledge by the exercise of due diligence before the circumstances prejudicial to the state occurred.

<sup>63</sup> See H. Rep. No. 1471, 94th Cong., 2d Sess. 5 (1976).

criticism in hearings,<sup>64</sup> Congress amended the proposed rules to eliminate the presumption. The committee report explained that "it is unsound policy to require the defendant to overcome a presumption of prejudice."<sup>65</sup> Congress thus expressly decided not to place any burden on a habeas petitioner to justify even delays exceeding 5 years, unless the state first demonstrated actual prejudice attributable to the delay. As this Court has made clear, where Congress specifically rejected time limits under Rule 9(a), courts "should not lightly create a new judicial rule . . . to achieve the same end." *Vasquez v. Hillery*, 474 U.S. at 265.

The Eleventh Circuit was on no firmer ground in relying on Lonchar's alleged failure to provide a "good excuse" for "waiting to the day of execution to seek relief." (J.A. 550). To begin with, the record simply does not permit the inference—and the courts below made no find-

<sup>64</sup> Habeas Corpus, 1976: Hearings on H.R. 15319 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 94th Cong., 2d Sess. (1976). Rule 9(a)'s presumption of prejudice was generally recognized by supporters and opponents alike as "the most controversial" aspect of the proposed rules because it was "the most serious attempt to change the traditional theory of the writ." *Id.* at 21-22 (statement of Robert N. Clinton, Associate Professor of Law, University of Iowa College of Law); see also *id.* at 47, 50 (statement of Daniel J. Kremer, California Assistant Attorneys General, On Behalf of California Attorney General Evelle Younger and the National Association of Attorneys General); at 107 (statement of Professor Frank Remington, University of Wisconsin Law School, On Behalf of the Judicial Conference of the United States). One proponent of the proposed Rule 9(a) acknowledged that it was "inconsistent with present case and statutory law. Indeed it is. There is no question about that." *Id.* at 49 (statement of Daniel J. Kremer).

<sup>65</sup> H.R. Rep. 1471 at 5; see also *id.* at 5 n.8 ("Those facts which make it difficult for the State to respond to an old claim (such as the death of the prosecutor) can readily be discovered by the State. It is not easy, and perhaps in some instances not possible, for a prisoner to discover those facts that he would have to show in order to rebut the presumption of prejudice").



ing—that by waiting until shortly before his scheduled execution to file a petition, Lonchar was consciously trying to obtain a delay to which he would not otherwise be entitled under applicable law had he acted sooner. And though he interrogated Lonchar extensively on other subjects, Judge Camp never asked Lonchar to explain why he waited until his execution was imminent to file. Indeed, the state conceded before Judge Camp that in the normal course of events (that is, absent the unusual prior litigation history in this case), a stay would have been proper here, notwithstanding that Lonchar's petition was filed shortly before his scheduled execution. June 28, 1995 Hearing, at 5-6 (J.A. 502, 504).

The State's position in the district court reflected established Eleventh Circuit law, *see Davis v. Dugger*, 829 F.2d 1513 (11th Cir. 1987) (Rule 9(a) dismissal not justified merely because delay results in petition filed on eve of execution); *Bundy v. Wainwright*, 808 F.2d 1410, 1420 (11th Cir. 1987) (stay required for petition filed on eve of execution if it contains substantial claim of denial of federal right), and is further supported by *Barefoot v. Estelle*, *supra*. That case makes clear that a person filing a first federal habeas petition should generally receive a stay of execution so long as the petition presents a substantial claim of denial of a federal right. 463 U.S. at 891-95. It recognizes no exception for petitions filed when an execution is imminent. Indeed, judgments about stays will typically arise under those conditions because execution dates are often set a very short time in advance of the scheduled execution. In Georgia, for example, a date is set *ex parte* and without notice to the defense, only 14 days before the beginning of the "execution window." Many petitions are therefore filed, as was this one, shortly before the beginning of the execution window.

With such a system in place, a rule penalizing the filing of a first federal habeas petition shortly before a sched-

uled execution would be irrational and unfair. To begin with, such a rule would mean that Lonchar could have avoided dismissal by filing only two weeks earlier. But this two-week delay cannot have affected the State's ability to respond to his petition. Moreover, such a rule would require potential petitioners to make sure they file prior to a "deadline"—the announcement of an execution date—they neither know about nor control. Such a rule would constitute a sharp break with traditional habeas practice, and would effectively nullify Rule 9(a) in capital cases and overrule *Barefoot v. Estelle*.

This Court's recent disposition of the application to vacate the stay in *Collins v. Byrd*, 114 S. Ct. 1288 (1994), also strongly suggests that it is an abuse of discretion to presume prejudice on the basis of a petition being filed shortly before a scheduled execution. In *Collins*, the district court refused a stay of execution to permit consideration of a first federal habeas petition filed eight days before a scheduled execution, but six years after the petitioner's conviction became final. The Sixth Circuit held that the district court abused its discretion in denying the stay. This court unanimously refused to vacate the stay.

Thus, the Eleventh Circuit's ruling cannot be justified on the grounds of Lonchar's alleged failure to explain the timing of his habeas petition.

## II. LONCHAR'S CONDUCT DURING PRIOR PROCEEDINGS CANNOT JUSTIFY THE ELEVENTH CIRCUIT'S REFUSAL TO PERMIT CONSIDERATION OF THE MERITS OF LONCHAR'S FIRST FEDERAL HABEAS PETITION

Because a habeas petitioner is not disentitled to relief merely by virtue of the timing of filing of a first petition, the Eleventh Circuit's decision can only be justified if something about the particular circumstances of this case warrants less favorable treatment for Lonchar. The

State has endeavored to make such an argument, on analogy to the "abuse of the writ" doctrine, by arguing that Lonchar acted "abusively" in forgoing prior opportunities to raise his federal claims. Accepting that argument, the Eleventh Circuit held that Lonchar's failure to pursue the claims earlier in the 1991 next-friend proceedings, or in the 1993 state proceeding he filed and then dismissed, justifies denying him the opportunity to raise them now.

But nothing in these prior proceedings justifies dismissal of Lonchar's petition.<sup>86</sup> To the contrary, the records in those proceedings demonstrate the inequity of the Eleventh Circuit's ruling.

First, far from waiving his claims in prior proceedings, Lonchar had every reason to believe the claims could be brought at a later time, because at every step in the process he was informed by the courts that he could do so. In the 1991 federal next-friend proceeding, *Kellogg v. Zant*, Judge Camp informed Lonchar that:

*"at any time you can change your mind up until the time your, of course, sentence is executed, and bring a petition for habeas corpus";*

*"if you abandon this proceeding you have to bring one in the future"; and*

*"a habeas corpus proceeding in federal court . . . is the last available means of relief that would be available to you from your sentence."*<sup>87</sup>

After giving Lonchar this advice, Judge Camp asked counsel to verify that this view of the law was correct. Counsel for both parties assented.<sup>88</sup>

<sup>86</sup> At the federal level, it is not at all clear how Lonchar could have "adopted" the next friend claims or participated in the proceeding. Had he done so, the claims would immediately have been dismissed for failure to exhaust state procedural options.

<sup>87</sup> Tr. at 443 (emphasis added) (J.A. 447).

<sup>88</sup> Tr. at 444 (emphasis added) (J.A. 447).

Lonchar had received identical assurances from the judge in the immediately preceding state next-friend proceeding. Although Lonchar declined to proceed at the time, the judge told him that "if you change your mind, you still have at least, for the time being an option to proceed." (J.A. 427). As late as the day before his scheduled execution, the court told Lonchar he still had the option to change his mind. Though warning that it might be too late as a practical matter if Lonchar waited until he was strapped into the electric chair, the court was clear that, although the next-friend petition had to be dismissed based on the court's finding that Lonchar was competent, Lonchar could still choose to initiate his own habeas petition even at that late hour: "[Lonchar] certainly has the ability to in effect stop [the execution] for the time being. The stay would in all likelihood have to be entered because there are claims in the petition or any petition that he could file that would require an evidentiary hearing. There is obviously not enough time and a stay would have to be entered." (3/28/90 hearing at 374, J.A. 439).<sup>89</sup>

Similarly, when Lonchar filed his first state habeas petition in 1993, and subsequently dismissed that petition, the State conceded that the petition was properly dismissed *without prejudice* (even going so far as to submit a proposed order to that effect), and the petition was in fact dismissed without prejudice. The State thus invited Lonchar to refile his petition at a later time, indicating in unmistakable terms that Lonchar would suffer no prejudice as a result. That initial order dismissing the petition without prejudice was entered in January 1995. Thus, as late as January of this year—and notwithstanding the *Kellogg* next-friend proceedings—Lonchar was still receiving assurances from the state court that he could refile later without prejudice. Furthermore, in

<sup>89</sup> Recognizing Lonchar's continuing right to file an appeal, the judge granted an access order to Lonchar's attorney in case Lonchar changed his mind. 3/28/90 hearing at 378-79, 381.



Lonchar's June 1995 state habeas proceeding, counsel for respondent conceded that there was no evidence of a waiver by Lonchar in any prior proceeding. (J.A. 499).

On these facts, Lonchar's failure to litigate his claims earlier can hardly be called "abusive." Although Lonchar might have pursued his claim sooner in other proceedings, and he did not pursue those claims until his execution was imminent, Lonchar simply did what both state and federal judges expressly assured him he could do—file a petition "at any time" before his execution. Lonchar's conduct cannot constitute a default or an abuse of the writ, and thus cannot shift to him the burden of demonstrating "cause" or otherwise disentitle him to relief.

Indeed, finding Lonchar's conduct "abusive" would be antithetical to elemental precepts of fairness and equity. This Court has repeatedly stressed "fair notice as the bedrock of any constitutionally fair procedure." *Lankford v. Idaho*, 500 U.S. 110, 121 (1991). It is basic that a state may not penalize "a citizen for exercising a privilege which the State had clearly told him was available to him": such action amounts to "an indefensible sort of entrapment by the State." *Cox v. Louisiana*, 379 U.S. 559, 571 (1965) (quoting *Raley v. State of Ohio*, 360 U.S. 423, 426 (1959)). See also *Wainwright v. Greenfield*, 474 U.S. 284, 289-90 (1986); *Doyle v. Ohio*, 426 U.S. 610, 618-19 (1976). This is true whether or not the deception was intentional, whether or not the assurances were legally erroneous, and whether or not the assurances affected Lonchar's conduct. *Raley*, 360 U.S. at 438-39; *Johnson v. Ohio*, 318 U.S. 189, 196 (1943); *Greenfield*, 474 U.S. at 291 (in the context of *Miranda* warnings, the government may "induce" action by implicitly assuring that such action will not be penalized).<sup>60</sup>

<sup>60</sup> See generally *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60-61 & nn.12-13 (1984); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 387-88 (1947) (Jackson, J., dissenting).

*Second*, even apart from these many express assurances, it was improper to penalize Lonchar on the basis of the next-friend proceedings. To begin with, Lonchar should not be held accountable for any delay caused by proceedings instituted without Lonchar's authorization and against his wishes. There is not a shred of evidence or even an allegation—and certainly no finding by any court in this case—that the next-friend petitions were the product of collusion between Lonchar and the next friends, or constituted a deliberate ploy undertaken by Lonchar to extend the period during which his execution would be stayed. Lonchar thus should be in no worse position than he would have been in had the next-friend petitions never been filed.

That conclusion is not altered by the fact that Lonchar was compelled to testify in those proceedings as to whether he intended to pursue relief in his own behalf. The very filing of the next-friend petition made necessary an inquiry into Lonchar's intentions because a putative next-friend has standing only if the real party in interest is incompetent to act on his or her own behalf. In cases where the next-friend files the initial petition, the court's final judgment simply dismisses it for lack of standing. The ruling does not dispose of merits of the substantive claims asserted in the petition. Thus, the judgment itself cannot foreclose the real party from seeking relief in the future. Nor should the real party's testimony have a preclusive effect. At most, the real party will have testified as to a present intention not to seek relief in the future. There is no reason why the real party, by virtue of a third party's unauthorized action, should be forced to make an irrevocable choice whether to proceed in the future that no other person in custody must make. Rather, a real party's essentially involuntary testimony in these circumstances should leave him no worse position than he was in before the unauthorized petitions were filed—i.e., with the right to file a petition later in his own behalf should he choose to do so.

The courts adjudicating the next friend petitions at issue here plainly recognized as much at the time, repeatedly advising Lonchar that he was free to bring his federal claims in the future should he choose to do so. Similarly, if Lonchar's testimony in the initial next-friend proceedings in *Kellogg v. Zant* constituted a waiver of his federal claims, his 1993 state habeas petition should have been dismissed out of hand. Yet the State did not even argue for dismissal on the basis of Lonchar's prior testimony. Similarly, there would have been no need for any inquiry into Lonchar's competence at the subsequent next friend proceeding (*Milan Lonchar v. Zant*) if Lonchar's claims had already been defaulted. Yet both the state and federal courts nonetheless conducted a competency inquiry in the *Milan Lonchar* proceeding, and determined that Larry Lonchar was competent to choose whether to proceed.<sup>61</sup>

Third, Lonchar's conduct simply was not "abusive" in the way that term has traditionally been understood and applied in habeas. "Abuse of the writ" is not a free-form equitable doctrine that authorizes the dismissal of habeas petitions whenever the court determines a petitioner should have acted differently. Rather, the doctrine, as codified in 28 U.S.C. § 2244 and Habeas Rule 9(b), addresses the specific problem of successive habeas petitions. "Abuse of the writ" arose in response to the inapplicability of *res judicata* to habeas corpus, and authorizes habeas courts to dismiss successive habeas petitions if a claim for relief either was adjudicated, or should have been adjudicated, in a prior federal habeas petition. See *McCleskey v. Zant*, 499 U.S. at 481;

<sup>61</sup> Other courts have recognized this as well. See *Smith v. Armantrout*, 865 F.2d 1515 (8th Cir. 1988) (allowing petitioner to pursue federal claims on habeas after § 2254 petition brought by next friend had previously been dismissed because the petitioner competently disclaimed his desire to proceed).

*Sanders v. United States*, 373 U.S. 1, 8 (1963).<sup>62</sup> But Congress could not have been more clear that an "abuse of the writ" may be found only if there has been a "determination . . . on the merits" in federal court. See Rule 9(b); 28 U.S.C. § 2244 (abuse of the writ applies only "[w]hen after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a Justice or judge of the United States release from custody or other remedy on an application for writ of habeas corpus"). Here there never was an adjudication on the merits.

For this reason, this case is entirely different from the only case the Eleventh Circuit identified as supporting its ruling—*Gomez v. United States District Court*, 503 U.S. 653 (1992). *Gomez*, of course, was an extreme case. This Court considered the propriety of a district court order staying the execution of Robert Alton Harris, which had been entered in an action brought pursuant to 42 U.S.C. § 1983 challenging California's method of execution. Harris, however, had previously brought four federal habeas petitions in his own behalf over the course of the preceding decade, and had received final decisions on the merits of those petitions. The stay at issue in the § 1983 proceeding, moreover, had followed closely on the heels of prior orders of this Court vacating stays of execution entered in habeas proceedings Harris filed in his own behalf.

Vacating the stay in the § 1983 proceeding, this Court made indisputably clear that it considered Harris' § 1983

<sup>62</sup> This was due both to the procedural nature of the writ, *McCleskey v. Zant*, 499 U.S. at 479 (absence of *res judicata* "made sense because at common law an order denying habeas relief could not be reviewed"), and to its substantive underpinnings, *Sanders v. United States*, 373 U.S. at 8 ("[c]onventional notions of finality of litigation have no place where life or liberty is at state and infringement of constitutional rights is alleged").



action to be a patent manipulation to avoid the preclusive force of Rule 9(b) and the abuse of the writ principles embodied therein. Had Harris sought to bring his challenge to the method of execution in a fifth habeas petition rather than as a § 1983 action, the claim would plainly have been dismissed as an abuse of the writ because he had previously received four final determinations on the merits of his federal petitions. Thus, even if Harris could technically have invoked Section 1983 to bring his challenge to the method of execution, its use in that case was properly rejected because it amounted to an end run around established "abuse of the writ" restrictions. When the Court spoke of "last minute attempts to manipulate the judicial process," 503 U.S. at 654, it was describing precisely this feature of Harris' conduct. And while the Court considered the last minute nature of the stay request, it did so in the context of a petitioner who had already received four prior determinations on the merits of federal habeas petitions.

This case is nothing like *Gomez*. Lonchar's petition is his first. He has received no prior adjudication on the merits of his federal petition, and thus is not raising new claims that should have been raised in his initial adjudication. Therefore, it simply is not an "abuse of the writ" within the meaning of that term. He is not seeking relief under § 1983 in order to avoid the force of an otherwise applicable procedural bar.

Furthermore, in the last analysis, there is simply no need to recognize a free-form "abuse of the writ" power to avoid problems of the kind the lower courts identified in this case. Ample mechanisms are available for dealing with such problems—and doing so in a way that gives clear notice to litigants of the risk of impending default. The State of Georgia could protect its interest in finality by requiring that a voluntary dismissal of a post-conviction petition be with prejudice. This the State explicitly chose not to do here, instead proposing an

order that expressly reserved Lonchar's right to return to court in the future. Georgia could also impose a statute of limitations for state postconviction review—as other States have.

The federal system likewise has the tools available to redress any perceived problems. Within the constitutional limits imposed by the Suspension Clause, Congress could pass a statute of limitations obviating virtually all the concerns raised below—and is presently considering just such a measure. Until now, Congress has affirmatively chosen through Rule 9(a) not to do this. Furthermore, as this Court made clear in *Barefoot v. Estelle*, a federal court can dismiss an initial petition summarily if it does not present a substantial claim of denial of a federal right. Doctrines of procedural default will often provide a basis for dismissing petitions—and will doubtless be raised later in these same proceedings if this Court reverses the Eleventh Circuit.

Although the State has an important interest in the finality of its judgments, see *McCleskey v. Zant*, 499 U.S. at 435, this interest does not lightly trump the fundamental principle that habeas relief is often "the only effective means of preserving" constitutional rights. *Id.* at 478 (internal quotation omitted). Even when a first federal habeas petition is at issue, the state's interest in finality and proceeding with its judgments receives substantial respect through the above doctrines, as well as others such as nonretroactivity and exhaustion. However, as *McCleskey* recognized, "[t]he federal writ of habeas corpus overrides all these considerations, essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition." 499 U.S. at 492-93. After all, "we are dealing here with an error of constitutional dimension—the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person." *O'Neal v. McAninch*, 115 S. Ct. at 997.

Lonchar has plainly raised substantial constitutional claims that would normally warrant a full airing. Indeed, as a result of his mental illness, and his absence from the trial, there is a very substantial question whether his trial and sentencing proceeding could satisfy even a minimal threshold of reliability. There is simply no basis for refusing to permit federal court review of his claims.

**III. LONCHAR'S ALLEGEDLY IMPROPER MOTIVE SEEKING FEDERAL HABEAS RELIEF CANNOT JUSTIFY THE ELEVENTH CIRCUIT'S REFUSAL TO PERMIT CONSIDERATION OF THE MERITS OF LONCHAR'S FIRST FEDERAL HABEAS PETITION**

The sole remaining reason for the Eleventh Circuit's ruling—Lonchar's allegedly improper motive—cannot support the extreme result below. It is undisputed that Lonchar genuinely sought the relief requested in his federal habeas petition, and that he presented potentially meritorious claims. The district court specifically found that "Lonchar is familiar with and wishes to assert the claims in his present habeas petition." (J.A. 58) That should have been the end of the matter.

It is well established in other areas of the law that "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent." *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 113 S. Ct. 1920, 1931 (1993). Thus, in antitrust cases, a court will not inquire into a litigant's subjective motives for filing suit unless the lawsuit has been found to be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* at 1928. Similarly, even an "improperly motivated" lawsuit cannot be enjoined as an unfair labor practice under the National Labor Relations Act unless the suit is objectively "baseless." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 744 (1983).

The same rule applies generally to federal civil litigation under Rule 11. The courts of appeals are in agreement that if "a reasonably clear legal justification can be shown for the filing of the paper in question, no improper purpose can be found and sanctions are inappropriate." *Sussman v. Bank of Israel*, 56 F.3d 450, 458 (2d Cir. 1995). *Accord In re Kunstler*, 914 F.2d 505, 518-20 (4th Cir.), *cert. denied*, 499 U.S. 969 (1991); *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990); *National Association of Gov't Employees, Inc. v. Nat'l Fed'n of Fed. Employees*, 844 F.2d 216, 223-24 (5th Cir. 1988); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 n.9 (9th Cir. 1986). Courts assessing whether a pleading was filed for an "improper purpose" do not "delve into the attorney's subjective intent." *Sussman*, 56 F.3d at 458 (quoting Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 195 (1985)).

As these courts have uniformly recognized, inquiry into the subjective motives for initiating legal action is inconsistent with the fair and efficient administration of justice. Typically, the calculation behind filing a lawsuit will be a jumble of mixed impulses—some entirely legitimate, others more questionable. "A party should not be penalized for or deterred from seeking and obtaining warranted judicial relief merely because one of his multiple purposes in seeking that relief may have been improper." *Sussman*, 56 F.3d at 459.

Requiring inquiry into a party's subjective motives for seeking relief will force courts into highly indeterminate, unstructured inquiries that will often lead nowhere. Such inquiries will be particularly unwieldy in habeas corpus cases involving condemned prisoners, where issues of the petitioner's mental health and mental capacity will often be central. And these inquiries will—as the record in this case illustrates—often threaten the integrity of the attorney-client privilege. The lack of objective and intel-



ligible standards should preclude an inquiry into subjective motives in § 2254 cases, as it does in other areas of the law. See *O'Neal v. McAninch*, 115 S. Ct. 992, 998 (1995) (noting particular virtues of easily administrable standards "[i]n a highly technical area such as [habeas]"); see also *Professional Real Estate Investors*, 113 S. Ct. at 1928.

An equitable doctrine authorizing inquiry into an individual's subjective motive for filing suit also contains the seeds of a serious threat to the most basic rights of citizens in a free society:

In our government of laws and not of men, each member of society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue or defense.

*ABA Model Code of Professional Responsibility* EC 7-1. Precisely because the inquiry into subjective intent is so indeterminate, it creates too great a risk that citizens will be deprived of their right to pursue legal action. Thus, the Eleventh Circuit should not have considered Lonchar's subjective motives as a factor in its equitable analysis.

**IV. EVEN IF THE ELEVENTH CIRCUIT CORRECTLY INTERPRETED THE SCOPE OF ITS AUTHORITY —AND IT DID NOT—APPLYING THESE NEWLY ANNOUNCED STANDARDS TO LONCHAR VIOLATES FUNDAMENTAL FAIRNESS BECAUSE HE HAD NO PRIOR NOTICE THAT HE RISKED FORFEITURE OF HIS HABEAS CLAIMS BY FAILING TO EXERCISE HIS OPTION TO FILE THE CLAIMS EARLIER**

Even if the Eleventh Circuit was correct that a first federal habeas petition may lawfully be dismissed without considering its merits on the basis of "abusive" conduct in circumstances other than those encompassed within traditional equitable principles codified in Habeas Rule

9, it was wrong to apply that newly announced rule to bar Lonchar's petition. Generally, a procedural bar must be "clearly announced to defendant and counsel" before it can be invoked to preclude review. See *Wheat v. Thigpen*, 793 F.2d 621, 625 (5th Cir. 1986) (quoting *Henry v. Mississippi*, 379 U.S. 443, 448 n.3 (1965)).

That certainly was not the case here. To the extent the Eleventh Circuit's ruling rested on the "last minute" nature of Lonchar's filing, it was a sharp break from prior practice—effectively creating a new species of laches outside the scope of Rule 9. To the extent it rested on Lonchar's failure to avail himself of the next-friend proceedings, Lonchar had no notice that not adopting the claims filed in those proceedings would work a forfeiture of his future right to do so. Indeed, as demonstrated, the courts repeatedly told him the opposite. Thus, it would violate fundamental fairness to apply any default doctrine here.

### CONCLUSION

The judgment of the court of appeals should be reversed.

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Department of the United States  
Immigration and Naturalization Service

LOUIS GRANT LONGHAR

Petitioner

H.C. THOMAS

Respondent

On Petition Granted by the  
United States Court of Appeals  
for the Seventh Circuit

ORDER OF REMOVAL

John Earl Thompson  
Senior Assistant  
Attorney General  
Council of Examiners  
for Immigration  
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Service  
Senior Assistant  
Attorney General

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## QUESTIONS PRESENTED

### 1.

Did the Eleventh Circuit Court of Appeals properly vacate the stay of execution because Petitioner's abusive conduct, offering no reason for the six year refusal to pursue state and federal remedies, offering no valid excuse for the manipulative practice of waiting until the day of his scheduled execution to seek relief, and filing a petition for the explicit purpose of delaying the execution, disentitled him to the equitable remedy of habeas corpus?

### 2.

Did Petitioner have adequate notice of the basis for the ruling of the Eleventh Circuit Court of Appeals because the Court relied on long-standing equitable principles and created no substantial change in the law?

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No. 95-5015

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In The  
**Supreme Court of the United States**  
October Term, 1995

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LARRY GRANT LONCHAR,  
*Petitioner,*  
v.

A.G. THOMAS,  
*Respondent.*

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On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Eleventh Circuit

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BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Petitioner, Larry Grant Lonchar, was indicted in DeKalb County, Georgia, for the malice murders of Charles Wayne Smith, Steven Smith and Margaret Sweat and the aggravated assault of Charles Richard Smith. Following a trial by jury, Petitioner was found guilty on three counts of murder, one count of aggravated assault and received a sentence of death by electrocution for the three counts of murder and a sentence of twenty years imprisonment for the aggravated assault conviction. Pursuant to the automatic appeal procedure the convictions



and sentences were affirmed on July 13, 1988. *Lonchar v. State*, 258 Ga. 447, 369 S.E.2d 749 (1988).

On March 8, 1990, an order scheduling a new execution time period was entered by the Superior Court of DeKalb County, Georgia, scheduling the execution for March 23, 1990, through March 30, 1990. Shortly thereafter, Mr. Michael Mears filed a "Motion to Require that Mr. Lonchar be Certified Competent Prior to the State of Georgia Joining His Attempt to Commit Suicide" in the criminal case in DeKalb County. The hearing was held on that motion on March 13, 1990. The DeKalb court issued an order on March 14, 1990, concluding that the court did not have jurisdiction or venue to consider the action and transferred the motion to the Superior Court of Butts County "for further proceedings as determined necessary by the Court."

Michael Mears then filed an emergency motion for stay of execution in the Supreme Court of Georgia and also filed a notice of appeal from the original order scheduling the execution time period. On March 20, 1990, the Supreme Court of Georgia deemed that the motion to stay the execution was premature and dismissed the motion without prejudice so that an application could be made in the Superior Court of Butts County, Georgia, "where the matter is presently pending."

#### (a) First Next Friend State Petition

A hearing was tentatively scheduled in the Superior Court of Butts County on March 21, 1990, based on suggestions that a petition was being filed under O.C.G.A.

§ 17-10-60. On the day of the scheduled hearing, counsel for the Respondent was served with a motion for a stay of execution and a petition for a writ of habeas corpus filed by Mr. Mears as counsel for Mr. Lonchar's sister, Chris Lonchar Kellogg. (J.A. 66). At the hearing, Mr. Mears, representing Ms. Kellogg, sought to have the Court allow Ms. Kellogg to proceed as next friend and sought to have the Court declare Petitioner Larry Lonchar incompetent in order that the next friend petition might proceed. Mr. Mears acknowledged that he was not asserting that Petitioner was incompetent to be executed. Petitioner emphatically stated that he opposed any petition being filed and specifically stated that he did not have counsel representing him. (J.A. 429-431). On March 28, 1990, the Superior Court of Butts County held a hearing to determine Petitioner's competency to waive any further proceedings. The court entered a written order on March 29, 1990, concluding from the evidence before it that Petitioner was competent. (J.A. 2). Thus, the Superior Court of Butts County denied the motion for a stay of execution and declined to allow Ms. Kellogg to proceed.

Counsel for Ms. Kellogg then filed an application for a certificate of probable cause to appeal in the Supreme Court of Georgia. That court granted the stay of execution on March 29, 1990, to allow the court to receive and consider the transcript of the hearing in the state habeas corpus court. On May 2, 1990, the Court issued an opinion dismissing the application for a certificate of probable cause to appeal and terminating the stay of execution. *Kellogg v. Zant*, 260 Ga. 182, 390 S.E.2d 830 (1990). In its opinion, the Supreme Court of Georgia specifically found

that Petitioner was "not psychotic, has normal intelligence and is competent to decide not to appeal further." *Id.* at 184. A subsequent petition for rehearing which was filed on May 14, 1990, was denied by the Supreme Court of Georgia on May 23, 1990.

Mr. Mears then filed a petition for a writ of certiorari in this Court on behalf of Ms. Kellogg. In addition, counsel for Ms. Kellogg sought to consolidate the case with one pending from the State of Texas. On October 1, 1990, the request for consolidation and the petition for a writ of certiorari were denied and the petition for rehearing was denied on December 3, 1990. *Kellogg v. Zant*, 498 U.S. 890, *reh'g denied*, 498 U.S. 1008 (1990).

#### (b) First Next Friend Federal Petition

On October 23, 1990, Ms. Kellogg, by Attorney Mears, filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia seeking to proceed on behalf of Petitioner Larry Lonchar. After various depositions were taken by both parties, an evidentiary hearing was held on November 12, 13, and 14, 1991. The district court entered an order and judgment on February 18, 1992, granting Respondent's motion to dismiss for lack of standing. (J.A. 20). Ms. Kellogg filed a notice of appeal on February 20, 1992, and an application for a certificate of probable cause to appeal. On March 12, 1992, the district court granted a certificate of probable cause to appeal.

The Eleventh Circuit Court of Appeals entered an opinion on November 13, 1992, affirming the decision of

the district court and finding that Ms. Kellogg lacked standing to proceed on behalf of the present Petitioner. *Lonchar v. Zant*, 978 F.2d 637 (11th Cir. 1992).

On or about December 2, 1992, Ms. Kellogg filed a petition for rehearing and suggestion for rehearing en banc which was denied on January 12, 1993. Ms. Kellogg filed a motion for stay of the mandate which was denied by the Eleventh Circuit Court of Appeals on January 25, 1993, and the judgment was issued as the mandate on that same date.

On or about February 4, 1993, Ms. Kellogg submitted a petition for a writ of certiorari to this Court. On February 5, 1993, the state trial judge signed a new execution order scheduling the time period for Mr. Lonchar's execution between noon on February 24, 1993, and noon on March 3, 1993. Ms. Kellogg filed a motion for stay of execution in the Supreme Court of Georgia which was denied on February 13, 1993. Certiorari was denied by this Court on February 24, 1993. *Kellogg v. Zant*, \_\_\_ U.S. \_\_\_, 113 S.Ct. 1378 (1993). On that same date, the State Board of Pardons and Paroles denied clemency. See Ga. Const. Art. IV, Sec. II, Para. II(d).

#### (c) 1993 State Petition Signed by Petitioner

Also on February 24, 1993, less than an hour before his scheduled execution, Petitioner consented to a petition being filed in his behalf and a petition was filed in the Superior Court of Butts County. A stay of execution was granted by the Superior Court of Butts County. On April 6, 1993, the case was assigned to the Honorable



Kristina Cook-Connelly, Judge of the Superior Court of the Lookout Mountain Judicial Circuit. On July 28, 1993, counsel for the Respondent warden wrote a letter to the court advising the court that she had received a letter from Petitioner stating that he wanted to dismiss his petition and proceed with his execution. Counsel for the Respondent subsequently received another letter from Petitioner, stating that he did not want to be represented by either Mr. Stafford Smith or Mr. Bayliss.

A hearing was held on June 23, 1994, at which time Petitioner specifically advised the court that he did not want to be represented by Mr. Bayliss or Mr. Stafford Smith and that he wanted to dismiss the petition. (J.A. 449). On January 25, 1995, an order was filed dismissing the petition without prejudice at Petitioner's request. (J.A. 34). On February 15, 1995, Mr. Bayliss and Mr. Stafford Smith filed a motion for reconsideration and a motion for leave to file an *ex parte* proffer, neither of which was authorized by Petitioner. Respondent opposed those motions as they were not authorized by Petitioner and because Mr. Stafford Smith and Mr. Bayliss were no longer Petitioner's "habeas counsel." On February 23, 1995, the court signed an order denying the motion for reconsideration and motion for leave to file an *ex parte* proffer. (J.A. 33).

On February 24, 1995, Mr. Bayliss and Mr. Stafford Smith filed an application for a certificate of probable cause to appeal and notice of appeal, again without authorization from Petitioner and not acting as next friend for any party. On April 6, 1995, the Supreme Court of Georgia denied the application for a certificate of probable cause to appeal. Respondent then filed a motion

to issue the remittitur because the application was an unauthorized pleading filed by attorneys who no longer represented Petitioner. On May 4, 1995, the Supreme Court of Georgia issued two orders, one denying Mr. Stafford Smith's motion for reconsideration of the denial of the application for a certificate of probable cause, and one granting Respondent's motion to issue the remittitur. On May 17, 1995, the remittitur was made the judgment of the Superior Court of Butts County.

On May 8, 1995, the Attorney General's office received a letter dated May 7, 1995, from Mr. John Matteson stating that he was representing Mr. Larry Lonchar and attaching a letter from Larry Lonchar to Mr. Matteson "hiring" him.

Subsequently, Mr. Stafford Smith and Mr. Bayliss filed an unauthorized petition for a writ of certiorari in this Court, without an affidavit of poverty from Petitioner. The Court required that a motion be filed requesting leave to file without the affidavit. On May 30, 1995, the Court specifically denied the motion and returned the petition for a writ of certiorari.

#### (d) Federal Civil Rights Complaint

On April 16, 1995, Petitioner signed a motion to be substituted as a plaintiff in a pending civil rights action in the United States District Court for the Northern District of Georgia in the case of *Nicholas Ingram and Larry Grant Lonchar v. Ault*, No. 1:95-CV-875-HTW. That civil rights complaint specifically raised the same allegations pertaining to the method of execution as have been presented in

the instant petition. On June 3, 1995, the district court denied the motion to substitute parties.

**(e) June 1995 Execution Window**

On June 8, 1995, Judge Robert J. Castellani of the Superior Court of DeKalb County entered an order setting a new time frame for Petitioner's execution beginning at noon on June 23, 1995, and ending at noon on June 30, 1995. The Department of Corrections set the date and time for execution for June 23, 1995, at 3:00 p.m.

On June 9, 1995, Mr. Larry Lonchar made a statement under penalty of perjury stating that Mr. Matteson represented him, that no other attorney was authorized to represent him, and that he did not want any further attempts made to stop his execution. On June 12, 1995, Mr. Mears wrote Judge Castellani to "suggest that the Court voluntarily disqualify itself" and to vacate the execution order.

On or about June 13, 1995, Mr. Mears, signing as counsel for Milan Lonchar, Jr., Petitioner's brother, without asking leave to file as next friend or making any assertions that Larry Lonchar was incompetent, filed a "Motion to Disqualify Judge" and a "Motion to Vacate Void Execution Order" in the Superior Court of DeKalb County. (J.A. 164). On June 14, 1995, the State, through the District Attorney's office, filed a motion to dismiss, asserting a lack of standing and that the motions were without merit on their face. On that same date, without addressing the timeliness or sufficiency of the motion to

disqualify, Judge Castellani entered an order directing that the motion be heard by another judge.

On June 20, 1995, a hearing was held in the Superior Court of DeKalb County. At that hearing, Mr. Mears filed a "Motion for Leave to Proceed as Next-Friend" on behalf of Milan Lonchar, Jr. After hearing argument from Mr. Mears and the District Attorney, Judge Robert Mallis ruled that Milan Lonchar lacked standing to proceed and, even if he had standing, there was no basis for disqualification because Judge Castellani had only performed a ministerial act in setting the execution "window" and had not performed any discretionary acts. The court entered a written order that afternoon. Mr. Mears, as counsel for Milan Lonchar, Jr., apparently filed a notice of expedited appeal in that court.

**(f) Second Next Friend Petition**

Shortly after 3:00 p.m. on June 20, 1995, counsel for Respondent received the next friend petition for writ of habeas corpus and a motion for an order permitting a psychological evaluation of Petitioner. (J.A. 176). A hearing was held before the Honorable E. Byron Smith, Judge of the Superior Court of Butts County, sitting in the Superior Court of Monroe County, at approximately 10:30 a.m., June 21, 1995. At that hearing, Petitioner again stated he wanted to proceed with the execution and stated that he *did not* want to be evaluated and that he was competent. (J.A. 473). The court ruled from the bench and entered a written order at 12:30 p.m. finding that Milan Lonchar lacked standing and noting that Petitioner had stated in open court that he did not want to be



evaluated and wanted the execution to be carried out (J.A. 35).

Milan Lonchar filed a notice of appeal that day and served an application for certificate of probable cause to appeal and a motion for a stay of execution on counsel for Respondent at 5:50 p.m. June 21, 1995.

On June 22, 1995, the Supreme Court of Georgia entered orders affirming the decision of the Superior Court of DeKalb County, denying the application for a certificate of probable cause to appeal from the next friend habeas corpus action and denying the motion for stay of execution. In a concurring opinion, Justice Sears concluded, "I believe Larry Lonchar has knowingly, intelligently and competently waived his right to seek all post-conviction relief concerning his convictions and sentence of death. . . . Larry Lonchar thus has forfeited all of his rights to assert the issues that Milan Lonchar now seeks to assert on his behalf." (J.A. 37-8).

#### **(g) Second Next Friend Federal Petition**

At approximately 6:00 p.m. that afternoon, Milan Lonchar, by counsel, filed a next friend federal habeas corpus petition. At approximately 10:30 p.m. that same evening, the district court dismissed the petition for lack of standing and denied the motion for a stay of execution. (J.A. 39). On June 23, 1995, the Eleventh Circuit Court of Appeals denied a certificate of probable cause to appeal and the motion for a stay of execution shortly after 2:00 p.m. (J.A. 50). On June 23, 1995, this Court denied a stay of execution and dismissed the petition for a writ of

certiorari for lack of jurisdiction which had sought to challenge the dismissal of the next friend habeas corpus petition.

#### **(h) State Court Civil Rights Complaint/1995 State Petition Signed by Petitioner**

On June 23, 1995, a civil rights complaint was filed in the Superior Court of Butts County, Georgia, on behalf of the Petitioner seeking only to challenge the method of execution. Also on that morning, counsel for Respondent received telephonic notice that Petitioner had "consented" to a state habeas corpus petition being filed and that a hearing was to be held that day at 1:00 p.m. in Butts County. Counsel for Respondent did not receive a copy of the petition until obtaining one from the warden immediately before the hearing began. (J.A. 308). At the hearing, although stating that he was adopting the allegations of the petition, Petitioner continually stated he only wanted to have time to see if the General Assembly of Georgia would change the method of execution. As the execution was scheduled for 3:00 p.m., the court entered a temporary stay indicating a ruling would be forthcoming the next week before the execution window expired. (J.A. 487). On that same date, Petitioner filed an emergency motion for stay of execution in the Supreme Court of Georgia noting the attempt to file a state habeas corpus petition.

On June 26, 1995, the Superior Court of Butts County entered an order denying the stay of execution and dismissing the state habeas corpus petition. Later that afternoon, the court denied the civil rights complaint for failure to state a claim upon which relief can be granted.

On June 27, 1995, at approximately 9:30 a.m., Petitioner delivered to counsel for Respondent motions for reconsideration from the orders vacating the stay of execution, dismissing the habeas corpus petition and denying the civil rights complaint. On that same date, the Superior Court of Butts County denied the motion for reconsideration as to all actions.

On June 27, 1995, Petitioner filed a motion for a stay of execution and application for a certificate of probable cause to appeal in the Supreme Court of Georgia. Late that afternoon the court denied probable cause to appeal, the motion for stay of execution and the earlier filed emergency motion for a stay of execution.

#### (i) June 1995 Larry Lonchar Federal Petition

At approximately 7:25 p.m. on June 27, 1995, counsel for Respondent was served with a federal habeas corpus petition signed by the Petitioner. That petition was filed the next morning on June 28, 1995. Respondent filed a response in opposition and a motion to dismiss due to Petitioner's abusive conduct. A hearing was held in the district court shortly before 11:00 a.m. and the district court gave Petitioner an opportunity to respond to the allegations of abuse and heard testimony from the Petitioner and Clive Stafford Smith. (J.A. 501). The court also

received supplemental briefs from both parties that afternoon. The court entered a temporary stay pending consideration of the motion to dismiss and the brief. At approximately 9:40 p.m., the district court entered an order denying the motion to dismiss and granting the motion for a stay of execution. (J.A. 53).

The next morning on June 29, 1995, the Respondent filed a motion to vacate the stay in the United States Court of Appeals for the Eleventh Circuit. (J.A. 374). Out of an abundance of caution, Respondent also filed a notice of appeal from the order of the district court. On that same date, the Eleventh Circuit Court of Appeals entered an order vacating the stay of execution and providing that its mandate would issue at 5:00 p.m. *Lonchar v. Thomas*, 58 F.3d 590 (11th Cir. 1995).

Petitioner filed a suggestion for rehearing en banc in the Eleventh Circuit Court of Appeals and also filed a petition for a writ of certiorari in this Court. Later that evening, this Court granted the stay of execution and granted the petition for a writ of certiorari. (J.A. 552). The Eleventh Circuit Court of Appeals has subsequently concluded that it had no authority to act upon the suggestion for rehearing *en banc* and would not do so as this Court has jurisdiction over the case.

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### SUMMARY OF THE ARGUMENT

The Eleventh Circuit Court of Appeals properly vacated the stay of execution entered by the district court in this action due to the Petitioner's abusive conduct. Although this case does not present the classic example



of "abuse of the writ" and does not fall within the traditional parameters of either Rule 9(b) or Rule 9(a) of the Rules Governing Section 2254 Cases, Petitioner's conduct has in fact disentitled him to the relief he is presently seeking. Habeas corpus is an equitable remedy and petitioners seeking to invoke equitable relief are accountable for their own conduct and must come into the proceeding with "clean hands" in order to obtain equitable relief.

Petitioner's focus on the fact that this is his "first" federal habeas corpus petition is unavailing. Petitioner has still engaged in abusive conduct over the past six years through his deliberate failure to participate in cases when he was present in court, through his repeated insistence that he did not want to file habeas corpus actions, through his waivers of those actions and through his blatant manipulation of the judicial system by waiting until less than one hour before his scheduled execution on two separate occasions to decide to file habeas corpus proceedings. The obvious delay in this proceeding has been directly attributable to Petitioner's own actions in refusing to participate in the judicial process until the eleventh hour on two separate occasions.

General principles of equity unquestionably apply to habeas corpus cases. Therefore, Petitioner's conduct is key to the resolution of the issues before the Court. The costs associated with the Great Writ are particularly high in this case. To allow the Petitioner to engage in this repetitively abusive conduct would serve only to further undermine confidence in the judicial system and would reflect a disregard for the concerns of comity and finality.

Petitioner's reasons for circumventing the consequences of his own actions are insufficient to allow him to continue to manipulate the judicial system. It is not solely the delay in filing the petition that is abusive, but the delay considered in conjunction with the six years of refusal to participate in legal proceedings, the prior dismissal of his state habeas corpus action, the acts of waiting until hours before his scheduled execution on two separate occasions to file a petition and the stated purpose for the present petition - delay to seek only to change the method of execution.

Petitioner has also not shown any detrimental reliance which would excuse his conduct. Ample warnings were given of the possible consequences of his conduct and he has never stated that he has acted in reliance on any advice from the courts or the state in deciding either to dismiss his habeas corpus petition or in refusing to file a petition until hours before his scheduled execution. Thus, there was no reasonable reliance on any advice that would justify the conduct of the Petitioner.

Petitioner's motive or purpose in filing this petition is an appropriate consideration under the equitable principles governing habeas corpus. His stated purpose is only to delay the execution. Consideration of that purpose in this setting does not deny Petitioner access to the courts.

Finally, the Eleventh Circuit did not establish a new rule applicable to Petitioner's case and, therefore, there was no lack of notice. Petitioner has consistently had notice of the long-standing applicability of equitable principles to habeas corpus actions.

Petitioner's actions are not those of one seeking in good faith to have his convictions and sentences reversed and seeking to pursue equitable relief, but are rather the actions of one who is simply seeking to delay a presumptively lawful sentence of death. Even if Petitioner's intent has not been to manipulate the system, he has done so through his own actions, through the actions of his attorneys and through the actions of his family. To allow this type of abusive conduct would simply encourage others on death row to use this as a creative method to accomplish the goal of delay and to postpone consideration of any substantive issues until such time as the state either has lost the ability to appropriately defend those claims or, even if relief is granted, until such time as a retrial would be impracticable if not impossible.

The issue before this Court is whether general principles of equity can be used to examine the conduct of a litigant seeking equitable relief and whether, examining objective and subjective factors, Petitioner's conduct should disentitle him to that equitable relief. Due to the extreme costs of the writ of habeas corpus on such issues as finality and the public's confidence in the judicial system, the conduct in this case should not be tolerated.

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#### ARGUMENT

#### **I. PETITIONER'S ABUSIVE CONDUCT DISENTITLES HIM TO THE EQUITABLE RELIEF OF HABEAS CORPUS AND THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY VACATED THE STAY OF EXECUTION.**

The critical question for resolution by this Court is whether the Eleventh Circuit Court of Appeals acted

properly in vacating the stay of execution entered by the district court based upon a finding that Petitioner, through his own conduct, had disintitiled himself to the equitable remedy of habeas corpus. Respondent submits that even though this is technically the first federal habeas corpus petition actually signed by the Petitioner himself, equitable principles bar his misuse of the Great Writ in an unveiled attempt to simply delay his execution with no legitimate attempt to have the issues of the petition substantively reviewed. Petitioner has engaged in a prolonged and varied history of abusive conduct and does not have the "clean hands" necessary for equitable relief.

This Court has on numerous occasions set forth the extensive history underlying the Great Writ. *McCleskey v. Zant*, 499 U.S. 467, 477 (1991); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986); *Price v. Johnston*, 334 U.S. 266 (1948); *Wainwright v. Sykes*, 433 U.S. 72 (1977). From those and other cases, certain key principles emerge. English common law originally defined the substantive scope of the writ of habeas corpus and the original writ could be used by federal prisoners attacking confinement which was imposed by a court without jurisdiction or "detention by the Executive without proper legal process." *McCleskey v. Zant* at 478. Furthermore, common law principles of *res judicata* did not apply to a denial of habeas corpus relief. *Id.* at 479. This common law principle was subsequently reaffirmed by the Court's holdings in *Salenger v. Loisel*, 265 U.S. 224 (1924), and *Wong Doo v. United States*, 265 U.S. 239 (1924).

Underlying all habeas corpus cases, however, is a fundamental "principle that habeas corpus is, at its core,



an equitable remedy." *Schlup v. Delo*, \_\_\_ U.S. \_\_\_, 115 S.Ct. 851, 863 (1995). It is based on this equitable nature of the writ of habeas corpus that the Court has precluded a strict application of res judicata principles. *Id.* Thus, as clearly delineated in *Sanders v. United States*, 373 U.S. 1 (1963), and *McCleskey v. Zant*, equitable principles govern the writ of habeas corpus, including "the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *McCleskey* at 484-5, quoting *Sanders v. United States* at 17-18; *Murray v. Carrier*, 477 U.S. 478, 512 n.18 (1986) ("[H]abeas corpus has traditionally been regarded as governed by equitable principles. [Cit.] Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks."). In *Sanders* the Court gave examples of abuse of the writ including a deliberate withholding of grounds at the time of the filing of the first application and a deliberate abandonment of one of the grounds at the first hearing. The Court went on to emphasize, however, "[n]othing in the traditions of habeas corpus requires the federal courts to tolerate needless, piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." *Sanders* at 18.

This Court has also focused on the concerns raised by the application of the writ of habeas corpus, many of which are implicated in this proceeding.

To begin with, the writ strikes at finality. One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. "Without finality, the criminal law is

deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). And when a habeas petitioner succeeds in obtaining a new trial, the "'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time," *Kuhlmann v. Wilson*, *supra*, at 453, prejudice the government and diminish the chances of a reliable criminal adjudication. Though *Fay v. Noia*, *supra*, may have cast doubt upon these propositions, since *Fay* we have taken care in our habeas corpus decisions to reconfirm the importance of finality.

*McCleskey v. Zant*, 499 U.S. at 491. As noted by Chief Justice Burger, "[f]ew things have so plagued the administration of criminal justice, or contributed more to lower public confidence in the courts, than the interminable appeals, the retrials, and the lack of finality." *Evitts v. Lucey*, 469 U.S. 387, 405 (1985) (Burger, C.J., dissenting).

This Court has also observed the more limited nature of habeas corpus review as opposed to direct appeal. "Direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). In *Barefoot*, the Court went on to emphasize that federal habeas was even less "a means by which a defendant is entitled to delay an execution indefinitely." *Id.*

In reviewing issues of retroactivity, the Court has also reiterated the concerns of finality. "Without finality,

the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions 'shows only that "conventional notions of finality" should not have *as much* place in criminal as in civil litigation, not that they should have *none*.' " *Teague v. Lane*, 489 U.S. 288, 310, *reh'g denied*, 490 U.S. 1031 (1989) (emphasis in original), quoting Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 150 (1970).

Members of this Court have frequently expressed concern about the utilization of the writ of habeas corpus to delay state capital sentences and to interfere with the states' judicial processes. *Collins v. Byrd*, \_\_\_ U.S. \_\_\_, 114 S.Ct. 1288 (1994) (Scalia, J., dissenting from the denial of the application to vacate stay) ("the decision whether to assert jurisdiction over a habeas petition calls for an exercise of the court's equitable discretion . . . and the petitioner's delay in filing is a factor the court may consider"); *Stephens v. Kemp*, 464 U.S. 1027 (1984) (Powell, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting from the denial of the motion to vacate stay) ("Once again, as I indicated at the outset, a typically 'last minute' flurry of activity is resulting in additional delay of the imposition of a sentence imposed almost a decade ago. This sort of procedure undermines public confidence in the courts and in the laws we are required to follow."). See also *Wainwright v. Spink*, 442 U.S. 901, 903 (1979) (Rehnquist, J., dissenting from the denial of the motion to vacate stay) ("When a State has taken all steps required by our capital cases, its will, as represented by the legislature that authorized the imposition of the death sentence and by the juries and courts that imposed and upheld it,

must be carried out. Constant and repeated frustration of the state's lawful action in such a situation is contrary to the underlying assumptions of our federal system.").

More recently, and specifically in considering an allegation under 42 U.S.C. § 1983 that execution by lethal gas was cruel and unusual punishment, the Court specifically declined to enter a stay. "Whether his claim is framed as a habeas petition or as a § 1983 action, [the plaintiff] seeks an equitable remedy. Equity must take into consideration the state's strong interest in proceeding with its judgment and [the Petitioner's] obvious attempt at manipulation." *Gomez v. United States District Court*, 503 U.S. 653, 654 (1992) (per curiam). In that case the Court also held that "[a] court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Id.*

In *Engle v. Isaac*, 456 U.S. 107, 127, *reh'gs denied*, 456 U.S. 1001, 457 U.S. 2976 (1982), this Court also emphasized the "significant costs" associated with collateral review which "extends the ordeal of trial for both society and the accused." Furthermore, "[l]iberal allowance of the writ, moreover, degrades the prominence of the trial itself. A criminal trial concentrates society's resources at one time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence." *Id.* at 127, quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). The Court has emphasized the protections provided for the accused and that habeas corpus, "rather than enhancing these safeguards . . . may diminish their sanctity by suggesting to the trial participants that there may be no need to adhere to those safeguards during the trial itself." *Engle v. Isaac* at 127. Thus, "writs of habeas



corpus frequently cost society the right to punish admitted offenders. Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution." *Id.* at 127-8. Further, "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* at 128. Thus, the Court recognized, "the Great Writ imposes special costs on our federal system." *Id.*

It is beyond dispute that equitable principles govern the application of the writ of habeas corpus, that equitable considerations apply in determining whether the Petitioner is entitled to the writ and that this Court should consider the interests of the state in the finality of its convictions as well as the cost to society and to the federal judicial system of the continued litigation in this action.

A court clearly has the power to entertain a petition for a writ of habeas corpus challenging a state court conviction and sentence. 28 U.S.C. § 2244 and 2254. The issue in this case is what limitations are placed on that power or more specifically, "what standards should govern the exercise of the habeas court's equitable discretion in the use of this power?" *Reed v. Ross*, 468 U.S. 1, 9 (1984). "Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, 'dispose of the matter as law and justice require,' 28 U.S.C. § 2243; and discretion was the flexible concept employed by the federal courts

in developing the exhaustion rule." *Murray v. Carrier*, 477 U.S. at 512 n.18. In making the determination of whether it is appropriate to exercise the power provided, the Court necessarily weighs the interest in providing a forum "for the vindication of the constitutional rights of state prisoners" and the interest of the state "in the integrity of its rules and proceedings and the finality of its judgments." *Reed v. Ross* at 10.

To preserve the integrity of the writ, this Court has placed certain limitations on the power to grant the writ. Specifically, in deciding to honor state procedural defaults, this Court has emphasized that there was no dispute about the power to entertain the application but rather whether the exercise of the power was appropriate under certain circumstances. "This Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forego the exercise of its habeas corpus power." *Francis v. Henderson*, 425 U.S. 536, 539 (1976). In exercising the power, "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, [should] always [endeavor] to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* at 541-2, quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971). See also *Wainwright v. Sykes*, 433 U.S. 72 (1977) (application of procedural default principles to a contemporaneous objection rule); *Engle v. Isaac* (application of procedural default to failure to raise issues on appeal); *Wainwright v. Sykes* at 79 (noting that Court in *Stone v. Powell*, 428 U.S. 465 (1976), "removed from the purview of a federal habeas court challenges resting on the Fourth

Amendment, where there has been a full and fair opportunity to raise them in the state court"). In fact, even the exhaustion of state remedies requirement was first established by this Court in *Ex parte Royall*, 117 U.S. 241 (1886). This Court recognized "while there was power in the federal courts to entertain such petitions, as a matter of comity they should usually stay their hand pending consideration of the issue in the normal course of the state trial." *Wainwright v. Sykes* at 80. Although these particular matters are not identical to the one addressed herein, these cases show this Court's "historic willingness to overturn and modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." *Wainwright v. Sykes* at 81.

In the instant case, Respondent is not relying on a specific statutory provision enacted by Congress such as 28 U.S.C. § 2244 or the Rules Governing Section 2254 Cases. Neither provision directly addresses the factual and procedural scenario presented in this case. In fact, Congress has been silent on the question of whether this Court may decline to review a "first" habeas corpus petition filed in federal court and actually signed by a petitioner when he has clearly engaged in abusive conduct, outrageous delay, and has effectively manipulated the judicial system, thus engaging in conduct that in a "successive" petition would clearly disentitle him to relief. Under these circumstances, when Congress has been silent on a specific matter, this Court should decline to draw any inferences from the failure to address what is obviously an unusual situation. This Court has previously noted, "[w]e have filled the gaps of the habeas

corpus statute with respect to other matters. . . . As always, in defining the scope of the writ, we look first to the considerations underlying our habeas jurisprudence, and then determine whether the proposed rule would advance or inhibit these considerations by weighing the marginal costs and benefit of its application on collateral review." *Brecht v. Abrahamson*, \_\_\_ U.S. \_\_\_, 113 S.Ct. 1710, 1719 (1993) (determining the appropriate harmless error standard to apply on collateral review). Thus, the mere fact that there is no specific statutory provision dealing with the precise situation in this case should not prohibit the Court from determining that the general equitable principles applicable to habeas corpus actions bar consideration of the instant petition.

Respondent submits that this Court may apply either an objective test under the "cause and prejudice" analysis or a subjective equitable analysis and still conclude that the Eleventh Circuit properly vacated the stay of execution. The cause and prejudice analysis has been applied by this Court to review procedural defaults and traditional abuses of the writ and would be equally applicable to the circumstances in this case. Respondent is not suggesting that this Court rewrite Rule 9(a) addressing delay or Rule 9(b) referring to successive petitions, but rather, that under the unusual circumstances of this case, it would be appropriate to examine Petitioner's cause for failing to file his own federal habeas corpus action for some six years and filing it only at the eleventh hour, when he had ample opportunity during that time to join in state and federal habeas corpus actions. Certainly, no cause has even been suggested. To satisfy the cause requirement, this Court has consistently recognized that



there must be a showing of some "external impediment" that would have prevented him from filing this petition and raising these claims. *See Murray v. Carrier*. The only so-called "impediments" were Petitioner's own deliberate choice not to pursue any of the issues raised in the instant petition earlier and Petitioner's assumption there was no reason to file a petition because the Georgia General Assembly would not change the statutory method for execution. This clearly does not establish cause.

Even if this Court were not to apply the "cause and prejudice" analysis, a subjective analysis under the equitable principles governing habeas corpus cases supports the decision by the Eleventh Circuit Court of Appeals and virtually mandates this Court's declining to consider this petition. Every court considering the Petitioner's attempts to delay his execution has found Petitioner's sole purpose in pursuing this litigation has been for delay and that Petitioner's conduct is abusive. The state court and the district court made specific factual findings that are pertinent to this analysis. Specifically, the state court declined to consider the merits of the petition based upon a finding that Petitioner's sole purpose in pursuing the appeal was to delay so that he could attempt to have the method of execution changed. The district court found the following facts:

Lonchar was aware of the availability of habeas corpus relief during this entire period and had discussed it with his attorney. Lonchar offered no reason for his failure to pursue review of his sentence except that he chose not to do so. He was aware of the potential legal arguments and

their factual predicates. Not only did he decline to pursue further review of his sentence, on at least three occasions he knowingly and voluntarily waived his further review of the sentence in open court.

\* \* \*

Within hours of his execution, Lonchar for the second time filed an application for writ of habeas in the State Courts. He agreed to file the petition after Mr. Stafford-Smith and his other attorneys advised him that the legislature might change the law to allow a different method of execution so that he could donate his organs.

\* \* \*

Lonchar is familiar with and wishes to assert the claims in his present habeas petition; however, his purpose in asserting the claims is not to obtain a review of the constitutionality and possible errors in his sentence. His sole purpose in asserting the claims is to delay his execution so that the method of execution may be changed to allow him to donate his organs upon death.

\* \* \*

The State has shown that despite 8 years of litigation over these claims, and numerous opportunities to join in the litigation, Lonchar has explicitly refused to bring these claims. In fact, in the first next-friend petition, the Court found that Lonchar made a voluntary and knowing waiver of his right to appeal on the claims. In this petition, Lonchar brings the same claims with the exception of the method of execution, that could have been brought in the prior next-friend petition.

\* \* \*

Lonchar fails to come forward with either objective or subjective reasons to excuse the conduct [footnote omitted]. Lonchar previously had the opportunity to obtain collateral review of all of the present issues and voluntarily declined to do so. Petitioner's reason for not raising the claims asserted in his habeas petition sooner is that he had just recently been convinced that he may be able to do some good by offering his organs for donation following his execution. This is not sufficient reason for failing to raise these issues when he previously had the opportunity to do so. Lonchar's failure to raise these issues earlier is certainly inexcusable negligence, if not voluntary abandonment.

(J.A. 56-61).

These findings by the district court virtually demanded that the Eleventh Circuit Court of Appeals vacate the stay of execution. As recognized by that court, "[w]e need not be detained, however, by a debate over whether this case is properly characterized as one involving an abuse of the writ or simply a case involving abusive conduct and misuse of the writ"; under either circumstance, "Lonchar does not merit equitable relief." (J.A. 550). There was no reason for Petitioner's refusing to pursue state remedies and to exhaust those state remedies so that he could file a federal petition; there was no reason for refusing to participate in a federal habeas corpus action where Petitioner sat in court for three days refusing to participate; there was no reason for his practice of on two separate occasions waiting until virtually the last hour to seek to pursue state remedies; and the

instant petition has been brought for the explicit purpose of delaying the execution, "not to vindicate his constitutional rights." *Id.*

Respondent submits that this case presents a set of circumstances so egregious as to justify this Court in applying equitable principles to find that no stay of execution should have been entered and there was no basis for considering the petition for writ of habeas corpus filed by the Petitioner. Therefore, Respondent submits that the decision of the Eleventh Circuit Court of Appeals should be affirmed.

## II. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED EQUITABLE PRINCIPLES AND GAVE APPROPRIATE CONSIDERATION TO THE PROCEDURAL POSTURE OF THE CASE AND THE FACTUAL CONTEXT TO DETERMINE THAT THE STAY OF EXECUTION SHOULD BE VACATED.

Petitioner sets forth three specific reasons why he alleges the decision of the Eleventh Circuit Court of Appeals is "unsupportable" based upon this Court's precedents. Respondent submits that the Eleventh Circuit properly applied controlling equitable principles and Petitioner has failed to show that he is entitled to the relief he seeks.

### A. Delay.

Petitioner first alleges that the dismissal of the instant petition based solely on delay is improper. Respondent has never asserted, nor did the Eleventh



Circuit Court of Appeals find, that delay alone was a sufficient basis for dismissing the instant petition. Clearly, the habeas corpus rules permit the state to move for dismissal of a habeas corpus petition based upon delay when there is a showing that the state has been prejudiced by the delay. Rule 9(a) of the Rules Governing Section 2254 Cases. This Court has specifically recognized that Congress has not yet provided "the State with an additional defense to habeas corpus petitions based on the difficulties that it will face if forced to retry the defendant." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). Similarly, Congress has not yet created a statute of limitations for federal habeas corpus proceedings.

In the motion to dismiss submitted to the district court, Respondent did raise a defense of delay or laches, asserting that the equitable nature of habeas corpus should allow the applicability of traditional laches principles. Respondent went on to state, "as the merits of the petition are not being reached at this time, or at least no evidentiary hearing is set, and due to the dilatory filing of this petition by Mr. Lonchar in relation to the scheduled execution, Respondent does not have information to make the showing of prejudice." (J.A. 387). Respondent never conceded that Respondent could not show prejudice, but only that due to the lateness of the hour and the fact that the merits of the petition were not being reached, Respondent did not have information on prejudice at that time. What Respondent has consistently asserted is that the delay in filing is one of many factors to be considered in examining the equitable nature of the relief sought by the Petitioner and whether Petitioner is entitled to that equitable relief. While not barring habeas

corpus actions only on the basis of delay without a showing of prejudice, this Court has referenced the delay in filing in its opinions as a factor in the equitable analysis. *Gomez v. United States District Court*, 112 S.Ct. at 1653 (holding "court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief"). Both the Respondent and the Eleventh Circuit Court of Appeals have alleged this is simply one of many factors to be considered. As noted by the Eleventh Circuit Court of Appeals, "A petitioner's willful delay and manipulation of the judicial system exacerbate [the cost of the writ of habeas corpus]." (J.A. at 549).

Furthermore, delay is but one of many factors that justified vacating the stay of execution and that justify denying relief to Petitioner. Delay is, therefore, an appropriate consideration in weighing the equities in this case.

#### **B. Reliance/Estoppel.**

Petitioner also asserts as a second basis for reversing the Eleventh Circuit's decision that, even if the equitable nature of habeas corpus would allow a dismissal under certain circumstances, it should not be permitted in this case because Petitioner allegedly received assurances that his prior actions would not result in a later bar, that the state court petition was dismissed without prejudice and that the "manipulation" was the fault of persons other than the Petitioner himself. Respondent submits that the Petitioner has failed to show any detrimental reliance on any representation by any person, much less by the courts or the state, and further, that the delay and manipulation are attributable to the Petitioner.

In essence, Petitioner is asserting that the state should be estopped from using the equitable nature of habeas corpus based upon representations that have been made to the Petitioner. Petitioner's argument itself seeks to invoke equity as "[e]stoppel is an equitable doctrine invoked to avoid injustice in particular cases." *Heckler v. Community Health Services*, 467 U.S. 51, 59 (1984). The party asserting estoppel "must have relied on its adversary's conduct 'in such a manner as to change his position for the worse,' and that reliance must have been reasonable." *Id.* In *Heckler*, the Court even suggested that "the Government may not be estopped on the same terms as any other litigant." *Id.* at 60. In any event, "when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." *Id.* at 61. Thus, the Petitioner must show that he received advice that would have given him reason to believe that his refusal to participate in prior actions and the dismissal of his state habeas corpus petition would not bar any, subsequent petition, that the advice was "given under circumstances that should have induced [his] reliance," *Id.* at 64, and that he did in fact rely on that "advice," whether from the court or the state. The record reflects absolutely no such reliance.

In most of the cases cited by the Petitioner, there was either an affirmative misrepresentation, an affirmative statement upon which a party relied or at least an implied statement or representation, such as the *Miranda* warnings, that would have justified reliance. See, e.g., *Doyle v. Ohio*, 426 U.S. 610 (1976); *Wainwright v. Greenfield*, 474 U.S. 284 (1986) (comments on silence subsequent to the

giving of *Miranda* warnings). This Court has recognized, however, that the issue becomes not only whether there was reliance in fact, but "whether that reliance was reasonable under the circumstances. . . ." *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 675 (1973).

The first opportunity for any discussion about the consequences of Petitioner's actions actually occurred during the pretrial and trial proceedings. At that time, Petitioner was asserting that he did not want to be present at trial at all and that he knew what the result of the trial would be. The trial court specifically reviewed with the Petitioner the consequences of his not presenting evidence and not being present in the court and gave the Petitioner the opportunity to change his mind at any time. (J.A. 391-417). At the hearing on the motion for new trial, the court also discussed Petitioner's request to waive his automatic direct appeal to the Supreme Court of Georgia. (J.A. 418-421)

The second opportunity arose in the state habeas corpus hearing on the first next friend action which was filed by Petitioner's sister, *Kellogg v. Zant*, No. 90-V-2735. A hearing was held on the motion for stay on March 21, 1990, and that court discussed with the Petitioner the consequences of his actions. Petitioner insisted that he was asking the court to carry out his sentence of death. (J.A. 424). The court advised the Petitioner that there were no other automatic rights to review his conviction and sentence and Petitioner stated he understood. *Id.* at 426. The court went on specifically to advise the Petitioner that even though he could change his mind at least for the time being, "there may be a limit to this." (J.A.



427). The court specifically stated, "but there very well could come a point between now and your date of scheduled execution, unless the court for some other reason prevented that, beyond which it could not be stopped. So, I just want you to understand that if for any reason you are not completely serious about your decision, you need to know the severity of the consequences. Of course, that sort of goes without saying that there could come a point when they could not be legally stopped." *Id.*

At the subsequent hearing on competency before the same court on March 28, 1990, the court again inquired of Petitioner whether he was making a knowing and voluntary decision and when he made the decision to waive his right to post-conviction review. Petitioner again reiterated that he did not want to proceed and even felt he should have had the right to waive his mandatory direct appeal. (J.A. 430). Later in that same proceeding, the court warned the Petitioner "that unless your execution is stayed by some other court that it could very well take place in a little more than 24 hours and that if you have any desire to change your mind at all, you need to make that decision at the earliest possible moment because there may come a time prior to execution in which you could not change that even if you then desired it." (J.A. 433). The court noted that at that point in time, if Petitioner filed a state habeas corpus petition raising claims requiring an evidentiary hearing, and if it were done early enough before the actual hour of the execution, a stay would more than likely be entered. *Id.* at 434. In that initial proceeding, the court and the parties acknowledged that Petitioner had the option to change his mind; however, the timing would be critical, with the court

again reiterating that "if he is playing games, so to speak, that it certainly could backfire because there could come a time when he could not change his mind. As long as he understands that, that's all the court can do." *Id.* at 437.

In the subsequent federal court proceedings in the next friend action filed by Petitioner's sister, *Lonchar b/n/f Kellogg v. Zant*, No. 1:90-CV-2336-JTC, the court inquired of the Petitioner if he understood the effect of his waiver of further appeals and the Petitioner stated, "I will be executed." (J.A. 442). Petitioner further reiterated that he understood that he was giving up the right to appeal the conviction and sentence. The court advised the Petitioner that he could change his mind up until the sentence was executed and Petitioner stated that he was aware of that, but "you can be assured that it won't happen." *Id.* at 447. The court did go on, however, to state, "[a]lthough if you abandon this proceeding you have to bring one in the future, but if you choose not to bring a habeas corpus proceeding in federal court, that is the last available means of relief that would be available to you from your sentence." *Id.* at 447.

The question again came up at the hearing on June 23, 1994, on Petitioner's request to dismiss the state habeas corpus petition he had filed, no. 93-CV-9. At that proceeding the court asked the Petitioner, "do you understand that if the court dismisses this petition, that if you changed your mind again that it might interfere with your filing another state habeas corpus petition?" (J.A. 462). Petitioner responded, "You don't have to worry about changing my mind again, I assure you." *Id.* The court again stated, "Do you understand that if I dismiss this petition, if you get upset thirty minutes before the

next time that there might not be anything that you can do about it?" *Id.* Petitioner responded, "That is right. You can take that right away." *Id.*

There were additional discussions at that hearing regarding a potential dismissal with prejudice with counsel for the Respondent stating, "I would like to be able to raise the dismissal of this petition as a procedural bar should Mr. Lonchar himself decide to proceed with another state habeas petition." (J.A. 467). The court responded, "I tried to make it perfectly clear when I was speaking with Mr. Lonchar that I consider this to be a final resolution of this now, before this particular court and I am functioning [sic] that he understood that." *Id.* at 468. The court later stated, "and I am not in the position to advise Mr. Lonchar." *Id.* at 469. Thus, at the conclusion of that hearing, the court made it clear that the court was advising Mr. Lonchar that he might not have the opportunity to refile any state proceeding or obtain a stay of execution in subsequent proceedings.

In the pleadings submitted subsequent to that hearing, the parties argued the possibility of dismissing the petition with prejudice. Petitioner seems to assert that the Respondent, by withdrawing the specific request for a dismissal with prejudice, acknowledged that Petitioner could file a state habeas corpus petition at any time he chose. A review of the pleadings shows that this is simply not accurate. In the response on the question of dismissal with prejudice, Respondent acknowledged that it was unclear under Georgia law whether a dismissal with prejudice would be appropriate under the specific circumstances of the case. "Respondent's concern is that the judicial system not be abused. Even if this petition is

dismissed without prejudice, if Mr. Lonchar decides to file a new petition, there would be questions raised about the appropriateness of that action." (J.A. 162). Thus, due to the ambiguity of state law, Respondent did not insist upon a dismissal with prejudice to avoid additional litigation and, "if necessary, allow subsequent courts to determine the effect of that dismissal on Mr. Lonchar's ability to pursue a state habeas corpus remedy." *Id.* Thus, no one in those proceedings stated that the dismissal of that petition would allow Mr. Lonchar to refile a state habeas corpus petition at any time under any circumstance and certainly did not suggest that he could again refuse to participate in a next friend petition and then subsequently again seek to stay his execution only hours before it was scheduled. The court clearly told Petitioner that she was not giving him advice about the possibility of a future petition and warned him that he might not be able to file a subsequent petition.

Thus, there was no advice given upon which Petitioner could have reasonably relied in relation to the state court proceedings. More specifically, no court ever advised the Petitioner that he could sit back and wait while two separate next friend actions were litigated, attempt to participate in a civil rights action, wait for yet another execution date to be set, wait for next friend proceedings to be litigated and then on the day his execution was scheduled, only hours before the execution, come in and attempt to stop the proceedings by filing yet another state habeas corpus petition.

Furthermore, in order to establish the concept of detrimental reliance, Petitioner must actually show he relied upon any of this "advice" in deciding not to file a



state or federal habeas corpus petition until the day of his scheduled execution in June of 1995. There is simply no evidence of reliance. In fact, that had absolutely nothing to do with Petitioner's decision not to file a petition until the last minute. In the district court, Mr. Lonchar simply stated that he had been convinced that he could save some people's lives and that he wanted to have the opportunity to do so. *Id.* at 512. The court specifically asked the Petitioner when he decided it was appropriate to delay his execution to have the opportunity to donate his organs and he stated the following:

It's been a few years, since, you know, which, it just, so much logic [sic] to me. And so, but as far as the record for the court, you know, I was just informed of this a couple of weeks ago that if I did stay my execution that something could be done, you know, because honestly I didn't believe that anything could be done. . . . But I have been informed just recently. . . .

*Id.* at 514. Petitioner further stated that he had come to the conclusion within the last two weeks that there was something that might be done to change the method of execution and that was why he was in court on that date. (J.A. 515).

No one ever offered any explanation from Mr. Lonchar that his dismissal of his first state habeas corpus petition was based on any reliance on any representations that he could refile at any time, that his refusal to participate in any of the two state and two federal next friend habeas corpus actions was based upon any reliance on representations made to him by anyone that he could

simply again sit back and wait for the most recent execution date and file a petition at the last minute.

Petitioner has simply failed to show any detrimental reliance which would justify an application of basic estoppel principles to allow the instant petition to proceed. Petitioner has failed to show that he is entitled to rely upon this equitable principle to pursue a federal habeas corpus petition at this stage of the proceedings.

Petitioner also refers to advice allegedly given to him by counsel. Petitioner never told any court that he relied on any such advice in deciding on his course of action. Further, advice of counsel in a post-conviction proceeding would not require the application of estoppel principles, particularly when Petitioner is not even entitled to counsel at that stage of the proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551 (1987).

Thus, Petitioner has not shown there was any reasonable reliance on advice or representations by anyone which would excuse his abusive conduct.

### C. Motivation

Petitioner also asserts that the Eleventh Circuit Court of Appeals erred in giving weight to his motive for filing the proceedings when it decided to vacate the stay of execution. The basic premise behind Petitioner's argument is that this interferes with his constitutional right to access to the courts and that motivation is not considered as a bar in any other type of litigation. Respondent submits that based upon the equitable nature of habeas

corpus, motivation has been a long standing consideration in deciding whether petitioners should be allowed to proceed and was properly considered in this case.

Petitioner cites to several different cases dealing with motivation in pursuing litigation. Certainly, as a general principle, "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731, 741 (1983). In addressing specific legal issues, this Court has addressed the concept of motivation for litigation and its effect. The cases cited by the Petitioner, however, relate to statutory issues such as unfair labor practices and whether a retaliatory motive for filing litigation would substantiate a claim of an unfair labor practice, *Id.*, or the question of whether anti-competitive intent or purpose in pursuing litigation would be a "sham" for purposes of antitrust immunity. *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, \_\_\_ U.S. \_\_\_, 113 S.Ct. 1920 (1993).

In the context of habeas corpus, and more specifically in the context of equity, however, motivation is a key factor considered by the courts. As noted previously and as set forth by this Court on numerous occasions:

Habeas corpus has traditionally been regarded as governed by equitable principles. [Cit.] Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.

*Murray v. Carrier*, 477 U.S. 478, 512 n. 18. Habeas corpus cases have frequently examined motivation. In *Wong Doo*

*v. United States*, the Court cited to the fact that the proof had not been presented earlier but had always been accessible as demonstrating the petitioner's "bad faith." *Id.* at 289; see, *Sanders v. United States*, 373 U.S. at 10. More specifically, in *Sanders*, this Court examined the question of deliberate abandonment of a ground in the prior petition and made the following oft-quoted holding: "Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, to entertain collateral proceedings whose *only purpose* is to vex, harass, or delay." *Sanders* at 18 (emphasis added). Therefore, this Court has clearly recognized that in equitable proceedings on a petition for a writ of habeas corpus, the purpose for filing the litigation is certainly a relevant consideration and not an impermissible restriction on the right of access to the courts.

This Court recognized a similar consideration in *Gomez v. United States District Court* noting, "equity must take into consideration the state's strong interest in proceeding with its judgment and [the plaintiff's] obvious attempt at manipulation." *Id.* at 654. To determine that there has been an attempt at manipulation, there obviously must be an inquiry into the motivation. The Court in *Gomez* went on to reemphasize that there was no good reason for the delay and referred to the last minute attempts to manipulate the judicial process. This is obviously a consideration of motive not only for filing the most recent petition, but the motive for not filing a petition earlier.

Respondent thus submits that the Eleventh Circuit Court of Appeals properly examined Petitioner's motivation and the purpose in filing this petition, which is



clearly only to delay his execution until such time as he can seek to have the method of execution changed, based upon his own admission that he will dismiss the petition subsequent to that time. This is a proper factor in considering an equitable doctrine and does not constitute a restriction on access to the courts.

Thus, none of the factors cited by the Petitioner undermine the validity of the holding of the Eleventh Circuit Court of Appeals in the unique procedural and factual posture of this case.

**III. PETITIONER HAS NOT BEEN DEPRIVED OF NOTICE AS THE RULING BY THE ELEVENTH CIRCUIT COURT OF APPEALS DID NOT APPLY A NOVEL RULE OR CREATE A NEW RULE OF EQUITY.**

Petitioner finally asserts that the ruling by the Eleventh Circuit Court of Appeals was a new rule, that he was not provided with notice of the application of this new rule, and that the court applied newly announced standards that he should not be required to satisfy. Respondent submits that the holding of the court in this case is no more than a restatement of equitable principles in existence for decades and did not state any new rule, and, thus, did not deprive Petitioner of notice.

This Court has frequently addressed the concept of novelty in the context of the application of either state procedural bars or holdings by this Court and in the context of determining the retroactivity of rulings by this Court. The Court has recognized that "[n]ovelty in procedural requirements cannot be permitted to thwart

review in this Court applied for by those who, in justifiable reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 457 (1958). Similarly, the Court has noted an exception to the cause and prejudice standard for examining procedural defaults when "counsel has no reasonable basis upon which to formulate a constitutional question. . . ." *Reed v. Ross*, 468 U.S. at 14. In that instance, the Court concluded that when the "constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." *Id.* at 16.

No such novel rule was applied in this case. As consistently noted, all the Eleventh Circuit Court of Appeals did was simply apply long standing principles of equity which have applied to habeas corpus cases for decades. Surely, Petitioner cannot be suggesting that he thought he was entitled to engage in abusive conduct by manipulating the courts, deliberately delaying the proceedings, and filing proceedings for the sole purpose of delay and other inequitable conduct. Nothing in any precedents of this Court even suggests that such conduct should be tolerated.

Therefore, Respondent submits that there is no new rule to be announced and no lack of notice to the Petitioner which would deny him due process. This Court should, therefore, apply equitable principles to find Petitioner is barred from pursuing this habeas corpus action.

**CONCLUSION**

For all of the above and foregoing reasons, Respondent prays that the judgment and verdict of the Eleventh Circuit Court of Appeals vacating the stay of execution entered by the district court be affirmed and that this Court vacate the stay of execution previously entered and allow the state court to proceed with Petitioner's lawfully imposed sentence of death.

Respectfully submitted,

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**FOR ARGUMENT**

8  
No. 95-5015

Supreme Court, U.S.  
**FILED**

NOV 6 1995

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1995

\_\_\_\_\_  
LARRY GRANT LONCHAR,  
*Petitioner,*

v.

A.G. THOMAS, WARDEN,  
GEORGIA DIAGNOSTIC & CLASSIFICATION CENTER,  
*Respondent.*

\_\_\_\_\_  
On Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit

\_\_\_\_\_  
**REPLY BRIEF FOR PETITIONER**

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On Writ of Certiorari to the  
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\_\_\_\_\_

REPLY BRIEF FOR PETITIONER  
\_\_\_\_\_

The State acknowledges that, in seeking dismissal of Lonchar's first federal habeas petition, it cannot rely on any existing rule—statutory or judge-made—that limits the scope of habeas corpus under Section 2254. The State is not directly invoking waiver, exhaustion, procedural default or any other categorical limitation on habeas relief. It repeatedly disavows any reliance on Habeas Rule 9(a) (Resp. Br. at 14, 24, 29), which permits dismissal of a first habeas petition for delay only if a state demonstrates prejudice. It likewise does not invoke 28 U.S.C. § 2244(b) or Habeas Rule 9(b) (Resp. Br. at 14, 24, 25), which on their face authorize dismissal only of successor habeas petitions.

Instead, the State invokes "general principles of equity" (Resp. Br. at 16) to fabricate a basis for dismissing Lonchar's petition by listing a series of circumstances, most of which involved alleged delay, but none of which is legally sufficient to support dismissal under Rule 9(a) in this case. The only circumstances identified by the State that are not integral to its delay argument—waiver and improper motive—are likewise legally insufficient to justify dismissal on this record. Thus, in this case, the State is claiming that the "equitable" whole is somehow more significant than the sum of its legally deficient parts. That cannot be the law.

At bottom, the State is not advocating the application of any recognized equitable doctrines at all. Instead, the State argues for a wide open, *ad hoc* weighing of the particular costs to the state's interests in finality and comity presented by each set of facts, in which a court is essentially free to decide for any reason that a first federal habeas petition should not proceed.<sup>1</sup> The State has not articulated *any* standard to apply in deciding when the costs to finality and comity are sufficiently high to justify dismissal of a first petition. Indeed, respondent is unable even to state whether this inquiry should focus on objective or subjective considerations.<sup>2</sup> Quite apart from the enormous problems of practical administration that would follow upon its adoption, such an approach would gravely threaten the basic traditions and purposes of the Great Writ. It should be firmly rejected.

<sup>1</sup> See Resp. Br. at 23 ("In making the determination of whether it is appropriate to exercise the power provided, the Court necessarily weighs the interest in providing a forum for the vindication of the constitutional rights of state prisoners and the interests of the state in the integrity of its rules and proceedings and the finality of its judgments" (quotations omitted)).

<sup>2</sup> See Resp. Br. at 25.

# **1. THE ELEVENTH CIRCUIT'S PRIMARY RELIANCE ON THE DELAY FACTOR WAS WHOLLY INAPPROPRIATE.**

The State does not dispute that delay is at the heart of its argument for dismissal.<sup>3</sup> Nor could it, for the Eleventh Circuit relied in substantial measure on the alleged absence of a "good reason for [Lonchar's] six-year refusal to pursue and exhaust his state collateral remedies and file a federal petition." (J.A. 550). That ruling cannot be affirmed unless the court's reliance on Lonchar's allegedly unexplained delay was justified.

Yet the State concedes that Lonchar's petition cannot be dismissed solely on this ground because Rule 9(a)'s prejudice requirement has not been met.<sup>4</sup> Faced with the obvious difficulty Rule 9(a) poses to its case, the State argues that "[i]t is not *solely* the delay in filing the petition that is abusive, but the delay considered in conjunction with the six years of refusal to participate in legal proceedings, the prior dismissal of his state habeas corpus action, the acts of waiting until hours before his scheduled execution on two separate occasions to file a petition and the stated purpose for the present petition—delay to seek only to change the method of execution." (Resp. Br. at 15) (emphasis added).

<sup>3</sup> See Resp. Br. at 14 ("The obvious delay in this proceeding has been directly attributable to Petitioner's own actions . . ."); *id.* at 28 ("There was no reason for Petitioner refusing to pursue state remedies and to exhaust those state remedies so that he could file a federal petition"); *id.* at 30 ("delay is one of many factors to be considered"); *id.* at 31 ("Delay is . . . an appropriate consideration in weighing the equities in this case").

<sup>4</sup> In the district court, the State reserved the right to seek dismissal on Rule 9(a) grounds in the future, but there is no dispute that the State has not yet made the effort to show prejudice as Rule 9(a) requires, and the State has expressly stated at every level of the judiciary that it is not relying on Rule 9(a) as grounds for dismissal of Lonchar's petition.



Of course, most of these additional considerations simply recast the delay point. The argument that Lonchar refused to authorize the next friend petitions is merely a particularized assertion that Lonchar could have raised his claims sooner. The same is true of the argument that Lonchar voluntarily dismissed his prior state habeas petition. The argument that Lonchar waited until the eve of execution to file is similarly an argument that the petition came too late. Thus, it is doubtful whether the State has presented an argument for dismissal of the petition that is broad enough to avoid the Rule 9(a) problem.

More fundamentally, the State is simply wrong to suggest that even though Lonchar's alleged failure to adduce a "good reason" for delay cannot be dispositive against him, it can weigh heavily against him when considered in conjunction with other factors. Counting unjustified delay as a substantial factor in a "totality of the circumstances" analysis is no less a transgression of Rule 9(a)'s limits on a habeas corpus court's equitable discretion than is counting it as a dispositive factor. In either case, the petitioner is denied federal habeas corpus review on the basis of an allegation of delay, despite the absence of any showing of prejudice.

This conclusion cannot be avoided by arguing that Congress was "silent" as to the consequences of delay in filing habeas petitions. (See Resp. Br. at 24). Congress spoke directly and unequivocally to that issue in Rule 9(a). Delay counts against a petitioner when the State demonstrates that it "has been prejudiced in its ability to respond to the petition," and such prejudice must be proved by the State in each instance. 28 U.S.C. § 2254 Rule 9(a) (see Pet. Br. at 24-26). A court exercising equitable discretion must respect this specific congressional judgment. Indeed, it has long been established that "the duty of every court of justice, whether of Law or of Equity, [is] to consult the intention of the Legislature. And, in the discharge of this duty, a Court of Equity

is not invested with a larger, or a more liberal, discretion than a Court of Law." I Joseph Story, *Commentaries on Equity Jurisprudence As Administered in England and America* § 14 (1835) (American Law: The Formative Years ed. 1972). There is simply no "gap" in the habeas statutes and rules with respect to the consequences of delay. See *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986); see generally *Schlup v. Delo*, 115 S. Ct. 851, 878 (1995) (Scalia, J., dissenting). Thus, there is simply no room for a court to consider delay in the manner proposed by the State.<sup>5</sup>

## II. AS A MATTER OF LAW, THE ELEVENTH CIRCUIT'S JUDGMENT CANNOT BE SUPPORTED ON THE GROUNDS OF WAIVER OR IMPROPER MOTIVE.

The State has taken much the same approach to its remaining arguments—waiver and improper motive. Like the State's delay argument, its waiver and motive arguments cannot justify dismissal of Lonchar's petition on the record in this case. For this reason, they should play no part in a "totality of the circumstances" analysis.

*Waiver.* The State does not argue waiver directly, but seeks instead to wrap waiver into the "totality of the circumstances" analysis by pointing to the district court's findings—including a finding of waiver—which "virtually demanded that the Eleventh Circuit . . . vacate the stay of execution." (See Resp. Br. at 27-28). Similarly, the State contends that Lonchar received "[a]mple warnings" that he risked forfeiting his habeas rights by choosing not to proceed earlier. (Resp. Br. at 15).

The State's approach to waiver suffers from exactly the same flaw as its approach to delay. A direct waiver

<sup>5</sup> Rule 9(a) is entirely consistent with traditional equitable principles of laches. See, e.g., *Costello v. United States*, 365 U.S. 265, 282 (1961); *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 215 (1963) ("The test of laches is prejudice to the other party").

argument cannot support the Eleventh Circuit's judgment because waiver cannot be found on the facts of this case. It is, therefore, wholly inappropriate to argue that some sort of quasi-waiver is a factor favoring dismissal of Lonchar's petition in a "totality of the circumstances" analysis. A constitutional right cannot be half-waived; waiver is not a concept that can be treated as a matter of degree. Yet that is what the State argues here in order to defend the Eleventh Circuit's legal error in relying on waiver.

To be valid, a waiver must be voluntary, knowing and intelligent. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (emphasis added). Therefore, to have waived his rights, Lonchar must have clearly understood that the "consequences of the decision" not to authorize the next friend proceedings, or to dismiss his prior state habeas petition, would be a forfeiture of his future right to file a petition in his own behalf.

Precisely the opposite happened in this case. At the very moment Lonchar was answering the question that allegedly formed the predicate for the waiver—indeed, at the conclusion of that questioning—Judge Camp specifically told Lonchar that even if he "abandon[ed]" his claims at that juncture, he could file his own petition "at any time" prior to execution. (J.A. 447) In other words, Judge Camp specifically instructed Lonchar that his decision not to proceed would *not* have the consequence of barring a future decision to press the claims.<sup>6</sup>

<sup>6</sup> Similarly, although Lonchar was warned during the state next friend proceeding that "there may come a time prior to execution in which you could not change that even if you then desired it" (J.A. 433), this colloquy occurred only a few hours before his execution was scheduled to take place. The full transcript of this

The same is true with respect to the dismissal of Lonchar's first state habeas petition. It simply cannot be that a voluntary dismissal "without prejudice" waives the dismissed claims. The State nevertheless contends that Lonchar can be penalized for dismissing his petition because he was warned at the hearing preceding dismissal that he risked a waiver should he do so. But that paints a highly misleading picture of what actually transpired. The State did argue that Lonchar's voluntary dismissal should operate as a procedural bar to relitigation in state court, and the court did ask Lonchar whether he understood that risk. But immediately after explaining that dismissal ought to preclude a future state habeas petition, in a part of the colloquy omitted from respondent's brief, counsel for the State said, "[t]hat is where I am asking for the *with* prejudice." (J.A. 467) (emphasis added). Lonchar's counsel argued that dismissal should be without prejudice to any future habeas filings. The court then took the issue under submission, and subsequently dismissed without prejudice. The only plausible interpretation of that action is that the court *rejected* the State's position on waiver. The State obviously read the court's ruling this way. When Lonchar refiled his state habeas petition in June 1995, the State did not argue procedural default. To the contrary, counsel specifically stated that there had been no "specific waiver on the record in any particular proceeding." (J.A. 499).

The State argues that Lonchar has not proved reliance on these representations, and thus cannot invoke estoppel. (*see* Resp. Br. at 32-39). That puts the cart before the

hearing makes clear that the court was simply warning Lonchar that, as a practical matter, he might not be able to stop the execution if he waited too long before changing his mind—not that his failure to go forward then and there would work a legal forfeiture of his rights.



horse. Estoppel would be relevant only if the State first established that, as a matter of law, Lonchar had forfeited his rights, thus putting Lonchar in the position of needing a theory to revive them. But the very question here is whether Lonchar waived his rights, and the answer is that he did not. Reliance, therefore, is irrelevant. And even if it were relevant, the record contains specific evidence that Lonchar was told by counsel that his prior actions would not waive his right to file a petition in the future (J.A. 535-36), thus creating a substantial factual issue whether Lonchar did rely on these representations. The district court conducted no inquiry into, and made no findings on, the reliance issue.

*Motive.* Petitioner's opening brief demonstrated that a first habeas petition should not be dismissed on the basis of an inquiry into the petitioner's subjective motives so long as the petition contains objectively meritorious claims for relief. (Pet. Br. at 36-38). The State counters that in *Sanders v. United States*, 373 U.S. 1, 18 (1963), this Court expressly endorsed dismissal of a successive habeas petition "whose only purpose is to vex, harass, or delay." (Resp. Br. at 41). But *Sanders* does not stand for the proposition that courts have the power to dismiss an objectively substantial first habeas petition based on a finding about the petitioners' subjective reasons for filing the petition. It was discussing a situation where a petitioner was aware that he had two available claims and had deliberately withheld "one of two grounds . . . at the time of filing his first application, in the hope of being granted two hearings rather than one." 373 U.S. at 18.

Thus, the only inquiry into state of mind contemplated in *Sanders* was a determination whether the petitioner was aware of the claim set forth in a second petition at the time of his first. In such a case, the division of the

claims can *only* have a purpose of achieving delay through piecemeal litigation. But such an inquiry into *knowledge* in a case involving a successive petition is a far cry from what the State seeks here—*i.e.*, a determination that Petitioner's right to pursue a substantial first habeas petition should be cut off because he is doing so for the wrong reason. The State has cited *no* authority for the rather radical proposition that a potentially meritorious, objectively reasonable legal claim can be dismissed based on a finding about a party's ultimate objective for filing.

Even if motive is considered, Lonchar's motives do not justify dismissal. His motive for filing may well have been bound up with his desire to see the law changed to permit organ donation. But that motive may well have been predicated on an assumption that he would receive a death sentence after retrial—an assumption entirely in keeping with the resolutely bleak outlook that characterizes his mental illness. His desire for more time to allow for changing the method of execution, therefore, is not inconsistent with genuinely seeking relief on the merits. Even if there is inconsistency in Lonchar's position, that is simply a manifestation of mental illness. Obviously, if he prevails on the claims he has asserted, and is not resentenced to death, his desire to donate his organs will not require any change in Georgia law. Indeed, had Lonchar's petition been adjudicated with dispatch, as counsel repeatedly requested, he could well have been afforded relief already.

### III. THE FACTORS CITED BY THE DISTRICT COURT, EVEN TAKEN AS A WHOLE, DO NOT JUSTIFY A FINDING OF UNCLEAR HANDS.

Quite apart from these clear legal errors, the State's "unclean hands" argument is beset with insuperable difficulties. It is not enough simply to label Lonchar's conduct as "abusive" or "manipulative" to bring it within this

equitable doctrine. A showing of bad faith is the *sine qua non* of unclean hands. See *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945); *ABF Freight System, Inc. v. NLRB*, 114 S. Ct. 835, 842 (1994) (Scalia, J., concurring); *Performance Unlimited v. Questar Publishers, Inc.*, 52 F.3d 1373, 1384 (6th Cir. 1995) (unclean hands is conduct that rises "to the level of fraud, deceit, unconscionability, or bad faith"); see generally 1 John N. Pomeroy, *Equity Jurisprudence* § 397 (4th ed. 1918) ("the maxim assumes some degree of moral guilt on the part of the plaintiff").<sup>7</sup> But nothing in the State's "totality of the circumstances" analysis even remotely establishes bad faith.

First, it was not an act of bad faith on Lonchar's part to have waited six years before filing a federal habeas petition. Congress has not imposed a statute of limitations on habeas, and, by eliminating the presumption of prejudice for delays exceeding 5 years in the proposed Rule 9(a) (see Pet. Br. at 24-25), made clear that prospective habeas petitioners are under no obligation

<sup>7</sup> Indeed, it is not at all clear that the State's argument falls within traditional equitable notions of "unclean hands." See *Black's Law Dictionary* 1367 (5th ed. 1979) ("Doctrine means no more than that one who has defrauded his adversary in the subject matter of the action will not be heard to assert right in equity"). The equitable rule is that

only when the plaintiff's improper conduct is the source, or part of the source, of his equitable claim, that he is to be barred because of this conduct. "What is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts."

Dan B. Dobbs, *Handbook on the Law of Remedies* 46 (1973) (quoting *Republic Molding Corporation v. B.W. Photo Utilities*, 319 F.2d 347 (9th Cir. 1963)). The State is not making any such claim here. Cf. *American Hosp. Supply v. Hospital Products Ltd.*, 780 F.2d 589, 601 (7th Cir. 1986) (Posner, J.) (doctrine of unclean hands "is not to be used as a loose cannon").

to file their first petitions within any particular time period.

Second, it was not an act of bad faith for Lonchar to refuse to authorize the next friend petitions putatively filed in his behalf. There is simply no evidence (and certainly no factual finding) that Lonchar colluded with his siblings to achieve unwarranted delay by having petitions brought in his behalf and then disowning them. The State nevertheless argues that "the delay and manipulation" resulting from these proceedings "are attributable to the Petitioner." (Resp. Br. at 31). But this argument does not (indeed, it cannot) rest on any claim that Lonchar deliberately sought to forestall his execution. Lonchar, after all, was at the time seeking death. Thus, by definition, Lonchar's conduct cannot amount to abuse and manipulation because he was not seeking to thwart the state's interest in proceeding with the execution.

Indeed, what the State is really challenging is not Lonchar's conduct during the next friend proceedings, but his subsequent change of heart. Yet that change of heart does not amount to bad faith. The State tacitly concedes as much, arguing that even if Lonchar's "intent has not been to manipulate the system, he has done so through his own actions." (Resp. Br. at 16). See also *id.* at 24 (alleging that Lonchar "has effectively manipulated the judicial system") (emphasis added); *id.* at 31 (manipulation is "attributable" to Lonchar). The State is thus arguing manipulative effects, not manipulative intent. The state is, in other words, arguing that Lonchar is disentitled to relief because his conduct has achieved the same effect he could have achieved had he intentionally manipulated the system. But the very point of unclean hands is that it punishes *purposeful* wrongdoing. And there is none here.

Third, it was not bad faith for Lonchar to wait until shortly before his execution to seek habeas relief. Ai-



though the Eleventh Circuit described this conduct as "manipulative," and the State deems it "blatant manipulation of the judicial system" (Resp. Br. at 14), the district court conspicuously failed to find any bad faith or manipulative intent in the timing of Lonchar's petition. (J.A. 58). The conduct is plainly not manipulative in the sense that term is typically used in habeas cases—there is no indication here that Lonchar was advancing claims with no prospect of success merely to forestall an inevitable execution. This is not a case, in other words, where the petitioner lacked substantial claims for relief, and waited until the last minute to file the petition in order to obtain a stay merely because the court would lack sufficient time to review the merits prior to the scheduled execution. Nor is it a case in which the petitioner engaged in piecemeal litigation solely to ward off execution of the state's judgment.

The complete explanation for the timing of the petition in this case is that Lonchar finally decided he wanted to live. He simply came to the conclusion that there might be enough potential in his life—that he might be able to do some good—to make his life worth living, and thus decided that he was no longer willing to acquiesce in its termination. As the record shows, he is a seriously mentally ill and troubled person, who has struggled throughout his life with overwhelming suicidal desires, and who in fact attempted to end his life while incarcerated. Whatever one might say about Lonchar's decision to file the petition, it certainly does not amount to bad faith manipulation of the system to achieve a delay that is not justified on the basis of the merits of the petition itself.

*Fourth*, bad faith cannot be made out on the basis of Lonchar's allegedly improper motives. Here too there is fundamental error because the district court's findings are contradictory. On the one hand, the court found that Lonchar genuinely wished to pursue his claims for relief.

On the other hand, the court found that Lonchar's sole purpose in doing so was to delay his execution. One cannot assert claims for relief that are objectively substantial, and genuinely seek to pursue those claims, and be found to have sought relief "solely" for purposes of delay. Lonchar's purpose, as expressed unequivocally in his testimony in response to Judge Camp's questions in June 1995 (J.A. 513), was to pursue his claims for relief in federal court. That should end the inquiry into bad faith.

#### **IV. THIS COURT SHOULD REJECT THE STANDARD-LESS CASE-BY-CASE EQUITABLE APPROACH FOLLOWED BY THE ELEVENTH CIRCUIT.**

The facts of this case are truly unique, as the State repeatedly acknowledges. But it is precisely for that reason that permitting adjudication of Lonchar's petition poses no systemic threat to the important interests in finality and comity that loom so large in the State's brief. That is why the State is unable to identify any recognized statute, rule, or equitable doctrine supporting the result below. Indeed, that is why the State has been unable even to find any case directly supporting the result below.

Having acknowledged that "the issue in this case is . . . what standards should govern the exercise of the habeas court's equitable discretion" (Resp. Br. at 22 (quotation omitted)), the State's answer is that *no* standards limit the court's discretion. Precisely because Lonchar's petition cannot be dismissed on the basis of any statute or rule such as Habeas Rule 9, or on the basis of any established categorical limitation such as procedural default, or even on the basis of any traditional equitable principle such as unclean hands, the State is forced to advocate an entirely *ad hoc* weighing of the competing interests and costs presented by each set of facts to come before a habeas court. The ruling below simply cannot be defended on any other basis.

To sanction the Eleventh Circuit's refusal to be bound by the fixed principles that inform and constrain a habeas court's equitable discretion—a refusal that is manifest in that court's belief that it “need not be detained” by such niceties as identifying particular standards, rules, or doctrines to justify dismissal of Lonchar's petition (J.A. 55C)—would “leav[e] district judges ‘at large in disposing of applications for a writ of habeas corpus,’ creating the danger that they will engage in ‘the exercise not of law but of arbitrariness.’” *Kuhlmann v. Wilson*, 477 U.S. 436, 445 (1986) (quoting *Brown v. Allen*, 344 U.S. 443, 497 (1953) (opinion of Frankfurter, J.)). “Discretion without a criterion for its exercise is authorization of arbitrariness.” *Brown v. Allen*, 344 U.S. at 497. For this fundamental reason, the State's position must be rejected.\*

Finally, even if this Court disagrees with Petitioner, and concludes that some considerations identified below might justify dismissing a first petition in some circumstances, the Eleventh Circuit's judgment must still be vacated and remanded. “It is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law.” *Schlup v. Delo*, 115 S. Ct. at 870 (O'Connor, J., concurring); *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990). As demonstrated, the Eleventh Circuit erred as a matter of law in considering Lonchar's failure to provide a “good reason” for not filing sooner, in relying on a finding of waiver, and in considering Lonchar's subjective motive for filing an objectively meritorious petition. Because these legal errors were at the heart of the Court's analysis, the proper course—if this Court does not agree with Peti-

\* See generally *Shondel v. McDermott*, 775 F.2d 859, 867-68 (7th Cir. 1985) (Posner, J.) (contrasting the “careful[ly] qualifi[ed]” discretion of the modern judge exercising equitable discretion with “the moralistic, rule-less, natural-law character of the equity jurisprudence created by the Lord Chancellors of England when the office was filled by clerics”).

tioner that reversal is required—is a remand for further consideration. See *Schlup v. Delo*, 115 S. Ct. at 869; *id.* at 870 (O'Connor, J., concurring).<sup>9</sup>

## CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded to the district court.

Respectfully submitted,

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<sup>9</sup> The State does not contest that “novelty in procedural requirements cannot be permitted to thwart review.” (Resp. Br. at 42-43 (quotation omitted)). Thus, the only disagreement between the parties is whether Lonchar was adequately on notice that his prior decisions not to participate in the next friend proceedings would bar his later efforts to obtain relief in his own behalf. As demonstrated, the State has not advanced a substantial argument on this point.